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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 198.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

CENTRAL IRON & COAL COMPANY.

ON ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

FILED JANUARY 12, 1933.

(29,344)

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CAPTION.

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH JUDICIAL
CIRCUIT.

Pleas and Proceedings Had and Done at a Regular Term of the
United States Circuit Court of Appeals for the Fifth Circuit Begun
on the Third Monday in October, A. D. 1922, at Montgomery, Ala-
bama, Before the Honorable Richard W. Walker, the Honorable
Nathan P. Bryan, and the Honorable Alex C. King, Circuit Judges.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,

versus

CENTRAL IRON & COAL COMPANY, Defendant in Error.

Be it remembered, That heretofore, to-wit, on the 3rd day of April,
A. D. 1922, a transcript of the record in the above styled cause, pur-
suant to a writ of error to the District Court of the United States for
the Northern District of Alabama, was filed in the office of the Clerk
of the said United States Circuit Court of Appeals for the Fifth
Circuit, which said transcript was filed and docketed in said Circuit
Court of Appeals as No. 3859, as follows, to-wit:—



TRANSCRIPT OF RECORD

UNITED STATES CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT

No.-----

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, a Corporation,
Plaintiff in Error,

vs.

CENTRAL IRON & COAL COMPANY,
a Corporation,
Defendant in Error.

ERROR TO THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DIVISION OF THE NORTHERN DIS-
TRICT OF ALABAMA.

FOSTER, VERNER & RICE, Tuscaloosa, Ala.,
Attorneys for the Plaintiff in Error.

H. A. & D. K. JONES, Tuscaloosa, Ala.,
Attorneys for Defendant in Error.

PROVINCE OF THE DISTRICT OF COLUMBIA

OFFICE OF THE DISTRICT COMMISSIONER

WASHINGTON, D. C.

REPORT OF THE DISTRICT COMMISSIONER

FOR THE YEAR 1901

PRINTED BY THE DISTRICT OF COLUMBIA

OFFICE OF THE DISTRICT COMMISSIONER

WASHINGTON, D. C.

1902

THE DISTRICT OF COLUMBIA

SUMMONS AND COMPLAINT

Filed January 8, 1920

CHAS. J. ALLISON, Clerk

UNITED STATES OF AMERICA

*DISTRICT COURT OF THE UNITED STATES**For the Northern District of Alabama, Western Division**The President of the United States of America to the
Marshal of said District—Greeting:*

You are hereby commanded to summon Central Iron & Coal Company, a Corporation, which is a citizen of the State of Alabama, to appear before the Honorable District Court aforesaid, at the place of holding said Court at Tuscaloosa, on the first Tuesday of June next, to answer the complaint of Louisville & Nashville Railroad Company, a Corporation, which is a citizen of the State of Kentucky, and have you then and there this writ.

Witness, the Hon. W. I. Grubb, Judge of the District Court of the United States for the Northern District of Alabama, this 8th day of January, in the year of our Lord, One Thousand Nine Hundred and Twenty.

Issued the 8th day of January in the year of our Lord, One Thousand Nine Hundred and Twenty.

Attest:

③

CHAS. J. ALLISON,

Clerk U. S. District Court, Northern District of Alabama

Executed the within summons and complaint by handing a copy to W. W. Taylor, Vice-President, for the Central Iron & Coal Company.

This the 2nd day of February, 1920.

H. A. SKEGGS, U. S. Marshal.

By W. E. GARNER, Deputy.

*IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DIVISION OF
THE NORTHERN DISTRICT OF ALABAMA.*

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, a Corporation, *Plaintiff.*

vs.

CENTRAL IRON & COAL COMPANY,
a Corporation, *Defendant.*

(1) Plaintiff is a corporation organized and existing under the laws of the State of Kentucky, is a citizen of the State of Kentucky, and has its domicile and chief office at Louisville in the State of Kentucky, and was at the time of the transaction hereinafter detailed, and now is, engaged in the business of common carrier by railroad in interstate commerce. Defendant is a corporation organized and existing under the laws of the State of Alabama, and is a citizen of the State of Alabama, having its principal place of business at Holt, in Tuscaloosa County, Alabama.

The sum in controversy in this action exceeds Three Thousand Dollars, exclusive of costs and interest, and

is claimed by plaintiff as freight and transportation charges earned by it and its connecting carriers on shipments carried for defendant in interstate commerce.

During, to-wit, the month of January, 1917, the defendant delivered to plaintiff at the plant of defendant at Holt, Alabama, for shipment to Tutwiler & Brooks as consignee at Mayer, Arizona, order notify Great Western Smelters Corporation at Mayer, Arizona, ten car loads of coke, containing, to-wit, eight hundred twenty-six thousand and six hundred (826,600) pounds of coke, and defendant noted on the billing, or directed that there be noted on the billing, that the said shipments be routed over "L&N SP at New Orleans, and AT&SF at El Paso," which meant that said shipment was directed by the defendant to be carried over the plaintiff's lines to New Orleans, thence over the lines of the Southern Pacific Railroad Company to El Paso, Texas, and thence over the Atchison, Topeka & Santa Fe Railroad Company's lines to Mayer, Arizona. The lawful rate, or combination of rates over the routing as directed was Twenty-one (\$21.00) Dollars for each car of said coke, and the lawful transportation charges for all of said shipments was Eight Thousand Five Hundred Forty-five and 61/100 (\$8,545.61) Dollars. Said shipments were carried over the route directed and safely delivered to the consignee named in the bills of lading, but by mistake the Agent of the Atchison, Topeka & Santa Fe Railroad, at Mayer, Arizona, collected as transportation charges for said shipments only Five Thousand Eighty-two and 15/100 (\$5,082.15) Dollars. There is a balance due from the defendant therefor of Three Thousand

Four Hundred Sixty-three and 46/100 (\$3,463.46) Dollars, with interest, which the defendant has failed and refused to pay, though often requested to do so.

WHEREFORE, the plaintiff claims of the defendant the said sum of Three Thousand Four Hundred Sixty-three and 46/100 (\$3,463.46) Dollars, with interest from, to-wit, February 1, 1917, for the benefit of itself and its said connecting carriers.

FOSTER, VERNER & RICE,

By J. M. FOSTER,
Attorneys for Plaintiff.

DEFENDANTS DEMURRER TO COMPLAINT

Filed April 16, 1921

CHAS. J. ALLISON, Clerk

*IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DIVISION OF THE NORTH-
ERN DISTRICT OF ALABAMA.*

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, a Corporation, *Plaintiff.*

vs.

CENTRAL IRON & COAL COMPANY,
a Corporation, *Defendant.*

Now comes Central Iron & Coal Company, defendant in the above stated cause, and demurrs to the complaint

in said cause, and for grounds of demurrer thereto sets down and assigns the following:

1. Said complaint shows that the entire amount of freight due upon the coke therein mentioned was collected by and paid to Atchinson, Topeka & Santa Fe Railroad Company, the delivering carrier, before the institution of this suit.

2. Said complaint shows that Great Western Smelters Corporation purchased and became the owner of the coke therein mentioned and became the party primarily liable for the freight thereon; that the Atchinson, Topeka and Santa Fe Railroad Company the delivering carrier, collected from said Great Western Smelters Corporation a part of the freight due on said coke, and does not show that either Atchinson, Topeka & Santa Fe Railroad Company or the plaintiff in this action, or any connecting carrier attempted or made any effort to collect from said Great Western Smelters Corporation the balance of freight due on said coke.

3. Said complaint shows that Great Western Smelters Corporation purchased and became the owner of the coke therein mentioned and became the party primarily liable for the freight thereon; that the Atchinson, Topeka & Santa Fe Railroad Company the delivering carrier, collected from said Great Western Smelters Corporation a part of the freight due on said coke, and does not show that it was unable to collect from said Great Western Smelters Corporation the balance of said freight, which the plaintiff seeks to recover in this action, from this defendant.

4. Said complaint shows on its face that Great

Western Smelters Corporation purchased the bill of lading for the coke therein mentioned and thereby became the owner of said coke and the party primarily liable for the freight on the same, and shows further that Atchinson, Topeka & Santa Fe Railroad Company, the delivering carrier, collected from said Great Western Smelters Corporation a part of the freight due on said coke, and upon the payment of the same delivered said coke to said Great Western Smelters Corporation, and fails to show that said Great Western Smelters Corporation was insolvent or that for this or any other reason said Atchinson, Topeka & Santa Fe Railroad Company was unable to collect from said Great Western Smelters Corporation the balance of the freight due on said coke, or that Atchinson, Topeka & Santa Fe Railroad Company, or the plaintiff in this action, or any connecting carrier made any effort to collect the balance due as freight on said coke from said Great Western Smelters Corporation before the institution of this suit.

H. A. & D. K. JONES,

Defendant's Attorneys.

DEFENDANT'S PLEA

Filed April 18, 1921

CHAS. J. ALLISON, Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DIVISION OF THE NORTH-
ERN DISTRICT OF ALABAMA.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, a Corporation, *Plaintiff*.

vs.

CENTRAL IRON & COAL COMPANY,
a Corporation, *Defendant*.

(1)

1. Now comes Central Iron & Coal Co., defendant in the above stated cause, and pleads to the jurisdiction of this Honorable Court over the subject matter of this cause, and for such plea says that both the plaintiff and the defendant are corporations, the plaintiff is a corporation organized under the laws of the State of Kentucky, and the defendant is a corporation organized under the laws of the State of New Jersey, and that neither the plaintiff nor the defendant is organized under the laws of the State of Alabama, nor are either of them a citizen of the State of Alabama, and that there does not exist between the plaintiff and the defendant such diver-

sity of citizenship as to confer on this Court jurisdiction of the person of this defendant to try this cause.

Wherefore, the defendant prays the Court to dismiss this cause.

H. A. & D. K. JONES,
Defendant's Attorneys.

(2)

2. Central Iron & Coal Co., defendant in this cause pleads to the jurisdiction of this Honorable Court over this case, and shows unto the Court that plaintiff is a corporation organized under the laws of the State of Kentucky, and defendant is a corporation organized under the laws of the State of New Jersey, and neither plaintiff nor defendant is organized under the laws of the State of Alabama, nor is either of them a citizen of the State of Alabama, and defendant prays judgment that this case be abated and dismissed.

H. A. & D. K. JONES,
Defendant's Attorneys.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DIVISION OF THE NORTH-
ERN DISTRICT OF ALABAMA.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, a Corporation, *Plaintiff*.

vs.

CENTRAL IRON & COAL COMPANY,
a Corporation, *Defendant*.

(3)

3. Now comes Central Iron & Coal Co., defendant in the above stated cause, and pleads to the jurisdiction of this Honorable Court over both the subject matter of this cause, and also to the jurisdiction of said court over the person of this defendant, and for such plea says that both the plaintiff and the defendant are corporations, the plaintiff is a corporation organized under the laws of the State of Kentucky and the defendant is a corporation organized under the laws of the State of New Jersey, and that neither the plaintiff nor the defendant is organized under the laws of Alabama, nor are either of them a citizen of the State of Alabama, and that there does not exist between the plaintiff and the defendant such diversity of citizenship as to confer on this Court jurisdiction of the person of this defendant to try this cause.

Wherefore the defendant prays the court to dismiss this cause.

H. A. & D. K. JONES,
Defendant's Attorneys.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DIVISION OF THE NORTH-
ERN DISTRICT OF ALABAMA.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, a Corporation, *Plaintiff.*

vs.

CENTRAL IRON & COAL COMPANY,
a Corporation, *Defendant.*

(4)

4. Now comes Central Iron & Coal Co., defendant in the above stated cause and pleads to the jurisdiction of this Honorable Court, over the person of this defendant, and for such plea says that both the plaintiff and the defendant are corporations, the plaintiff is a corporation organized under the laws of the State of Kentucky, and the defendant is a corporation organized under the laws of the State of New Jersey, and that neither the plaintiff nor the defendant is organized under the laws of Alabama, nor are either of them a citizen of the State of Alabama, and that there does not exist between the plaintiff and the defendant such diversity of citizenship as to confer on this Court jurisdiction of the person of this defendant to try this cause.

Wherefore the defendant prays the Court to dismiss this cause.

H. A. & D. K. JONES,
Defendant's Attorneys.

Before me, Charles J. Allison, Clerk of the United

States District Court for the Northern District of Alabama, personally appeared M. J. Moloney, who having been by me first duly sworn, doth depose and say that he is agent for Central Iron & Coal Company, defendant in the above stated cause and authorized to make this affidavit on its behalf; that he has knowledge of the facts stated in the foregoing pleas, numbered 1, 2, 3 and 4, and that said statements are true.

M. J. MOLONEY,
Agent for Central Iron & Coal Company, Defendant.

Sworn to and subscribed before me this 18th day of April, 1921.

CHAS. J. ALLISON,
Clerk.

DEFENDANT'S PLEAS
Filed April 19, 1921
CHAS. J. ALLISON, Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DIVISION OF THE NORTH-
ERN DISTRICT OF ALABAMA.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, a Corporation, *Plaintiff*.

vs.

CENTRAL IRON & COAL COMPANY,
a Corporation, *Defendant*.

Now comes Central Iron & Coal Company, defendant in the above stated cause, and for plea to the complaint in said cause pleads, separately and severally as follows:

(1) The defendant denies each and every averment of said complaint.

(2) The averments of said complaint are untrue.

(3) The defendant had sold the coke mentioned in the complaint to Tutwiler & Brooks, of Birmingham, Alabama, before the same was delivered to the plaintiff for transportation, and the defendant delivered said coke to the plaintiff as the property of the said Tutwiler & Brooks, for and on their account, and under their direction to so deliver it; that at the time said bills of lading were issued, this defendant was not the owner of said coke, but the said Tutwiler & Brooks were the owners of

the same, and were also the consignees of the same in said bills of lading, and that the service of transporting said coke was not rendered to or for the benefit of this defendant.

(4) The defendant was not the owner of the coke mentioned in the complaint at the time the bills of lading for the same were issued, but had, prior to that time sold said coke to Tutwiler & Brooks of Birmingham, Alabama, and delivered said coke to the plaintiff for and on account of, and under instructions from said Tutwiler & Brooks to that effect, and the service of transporting said coke was not rendered to or for the benefit of this defendant.

(5) The coke referred to in the said complaint was sold by this defendant to the firm of Tutwiler & Brooks of Birmingham, Alabama, at a fixed and stipulated price per ton, f. o. b. cars at Holt, Alabama; and said coke was sold by said Tutwiler & Brooks to Great Western Smelters Corporation of Mayer, Arizona, at a fixed or stipulated price per ton f. o. b. cars at Holt, Alabama, and under the terms of the contract of sale by Tutwiler & Brooks to Great Western Smelters Corporation, the said Great Western Smelters Corporation was to pay the freight upon said coke from Holt, Alabama to Mayer, Arizona; that under and in pursuance of instructions given by said Tutwiler & Brooks to this defendant, this defendant, for and on account of said Tutwiler & Brooks, delivered said coke to the plaintiff at Holt, Alabama, and, under and in pursuance of, and in accordance with instructions given this defendant by said Tutwiler & Brooks, this defendant consigned said coke to "Order of

Tutwiler & Brooks, Mayer, Arizona, Notify Great Western Smelters Corporation at Mayer, Arizona;" that said coke became the property of said Tutwiler & Brooks upon its delivery to the plaintiff at Holt, Alabama; that the bills of lading issued by the plaintiff for said coke were by this defendant at once delivered to said Tutwiler & Brooks, and said Tutwiler & Brooks thereupon endorsed said bills of lading and drew upon said Great Western Smelters Corporation a draft or drafts for the amount or amounts of the price which said Great Western Smelters Corporation had contracted to pay said Tutwiler & Brooks for said coke f. o. b. cars at Holt, Alabama, and attached to said draft or drafts said bills of lading and forwarded said draft or drafts, with said bills of lading attached thereto, to a bank at Prescott, Arizona, for collection, with instructions to deliver the said bills of lading to said Great Western Smelters Corporation upon payment by it of said draft or drafts; that Great Western Smelters Corporation paid the amount of said drafts to the said bank and received from it said bills of lading, endorsed by said Tutwiler & Brooks; that Atchinson, Topeka & Santa Fe Railroad Company, the delivering carrier, collected from Great Western Smelters Corporation, as the freight on said coke, a sum of money, to-wit: Five Thousand Eighty-Two and 15/100 Dollars (\$5,082.15), as freight on said coke, and thereupon delivered said coke to said Great Western Smelters Corporation; and neither said Atchinson, Topeka & Santa Fe Railroad Company nor the plaintiff, nor any connecting carrier of said coke prior to the institution of this suit against this defendant, made any

effort to collect from said Great Western Smelters Corporation the balance due as freight upon said coke, and here sought to be recovered from this defendant.

(6) The coke referred to in the said complaint was sold by this defendant to the firm of Tutwiler & Brooks of Birmingham, Alabama, at a fixed and stipulated price per ton f. o. b. cars at Holt, Alabama; and said coke was sold by said Tutwiler & Brooks to Great Western Smelters Corporation at Mayer, Arizona at a fixed or stipulated price per ton f. o. b. cars at Holt, Alabama, and under the terms of the contract of sale by Tutwiler & Brooks to Great Western Smelters Corporation, the said Great Western Smelters Corporation was to pay the freight upon said coke from Holt, Alabama to Mayer, Arizona; that under and in pursuance of instructions given by said Tutwiler & Brooks to this defendant, this defendant, for and on account of said Tutwiler & Brooks delivered said coke to the plaintiff at Holt, Alabama, and, under and in pursuance of, and in accordance with instructions given this defendant by said Tutwiler & Brooks, this defendant consigned said coke to "Order of Tutwiler & Brooks, Mayer, Arizona, Notify Great Western Smelters Corporation at Mayer, Arizona;" that said coke became the property of said Tutwiler & Brooks upon its delivery to the plaintiff at Holt, Alabama; that the bills of lading issued by the plaintiff for said coke were by this defendant at once delivered to said Tutwiler & Brooks, and said Tutwiler & Brooks thereupon endorsed said bills of lading and drew upon said Great Western Smelters Corporation a draft or drafts for the amount or amounts of the price which said Great West-

ern Smelters Corporation had contracted to pay said Tutwiler & Brooks for said coke f. o. b. cars at Holt, Alabama, and attached to said draft or drafts said bills of lading and forwarded said draft or drafts, with said bills of lading attached thereto, to a bank at Mayer, Arizona for collection, to deliver the said bills of lading to said Great Western Smelters Corporation upon payment by it of said draft or drafts; that said Great Western Smelters Corporation paid the amount of said draft or drafts to the said bank and received from it said bills of lading, endorsed by said Tutwiler & Brooks; that the Atchinson, Topeka & Santa Fe Railroad Company, the delivering carrier, collected from Great Western Smelters Corporation, as the freight on said coke, a sum of money, to-wit: Five Thousand Eighty-Two & 15/100 Dollars (\$5,082.15), and thereupon delivered said coke to said Great Western Smelters Corporation; and neither said Atchinson, Topeka & Santa Fe Railroad Company nor the plaintiff, nor any connecting carrier of said coke, exhausted prior to the institution of this suit its remedies for collecting from said Great Western Smelters Corporation the balance due as freight upon said coke, and here sought to be recovered.

(7) The coke referred to in the said complaint was sold by this defendant to the firm of Tutwiler & Brooks of Birmingham, at a fixed and stipulated price per ton f. o. b. cars at Holt, Alabama and said coke was sold by said Tutwiler & Brooks to Great Western Smelters Corporation of Mayer, Arizona at a fixed or stipulated price per ton f. o. b. cars at Holt, Alabama, and under the terms of the contract of sale by Tutwiler & Brooks

to Great Western Smelters Corporation, the said Great Western Smelters Corporation was to pay the freight upon said coke from Holt, Alabama to Mayer, Arizona; that under and in pursuance of instructions given by said Tutwiler & Brooks to this defendant, this defendant, for and on account of said Tutwiler & Brooks delivered said coke to the plaintiff at Holt, Alabama, and, under and in pursuance of, and in accordance with instructions given this defendant by said Tutwiler & Brooks, this defendant consigned said coke to "Order of Tutwiler & Brooks, Mayer, Arizona, Notify Great Western Smelters Corporation at Mayer, Arizona;" that said coke became the property of said Tutwiler & Brooks upon its delivery to the plaintiff at Holt, Alabama; that the bills of lading issued by the plaintiff for said coke were by this defendant at once delivered to said Tutwiler & Brooks, and said Tutwiler & Brooks thereupon endorsed said bills of lading and drew upon said Great Western Smelters Corporation a draft or drafts for the amount or amounts of the price which said Great Western Smelters Corporation had contracted to pay said Tutwiler & Brooks for said coke f. o. b. cars at Holt, Alabama, and attached to said draft or drafts said bills of lading and forwarded said draft or drafts, with said bills of lading attached thereto, to a bank at Mayer, Arizona for collection, to deliver the said bills of lading to said Great Western Smelters Corporation upon payment by it of said draft or drafts; that said Great Western Smelters Corporation paid the amount of said draft or drafts to the said bank and received from it said bills of lading, endorsed by said Tutwiler & Brooks; that the Atchinson, Topeka &

Santa Fe Railroad Company, the delivering carrier, collected from Great Western Smelters Corporation, as the freight on said coke, a sum of money, to-wit: Five Thousand Eighty-Two & 15/100 Dollars (\$5,082.15), and thereupon delivered said coke to said Great Western Smelters Corporation; and could have collected from said Great Western Smelters Corporation the balance due as freight on said coke, and here sought to be recovered from this defendant, if it had employed proper efforts and means to that end.

(8) The coke referred to in the said complaint was sold by this defendant to the firm of Tutwiler & Brooks of Birmingham, Alabama, at a fixed and stipulated price per ton f. o. b. cars at Holt, Alabama; and said coke was sold by said Tutwiler & Brooks to Great Western Smelters Corporation of Mayer, Arizona, at a fixed or stipulated price per ton f. o. b. cars at Holt, Alabama, and under the terms of the contract of sale by Tutwiler & Brooks to Great Western Smelters Corporation was to pay the freight upon said coke from Holt, Alabama to Mayer, Arizona; that under and in pursuance of instructions given by said Tutwiler & Brooks to this defendant, this defendant, for and on account of said Tutwiler & Brooks delivered said coke to the plaintiff at Holt, Alabama, and, under and in pursuance of, and in accordance with instructions given this defendant by said Tutwiler & Brooks, this defendant consigned said coke to "Order of Tutwiler & Brooks, Mayer, Arizona, Notify Great Western Smelters Corporation at Mayer, Arizona;" that said coke became the property of said Tutwiler & Brooks upon its delivery to the plaintiff at Holt, Alabama; that

the bills of lading issued by the plaintiff for said coke were by this defendant at once delivered to said Tutwiler & Brooks, and said Tutwiler & Brooks thereupon endorsed said bills of lading and drew upon said Great Western Smelters Corporation a draft or drafts for the amount or amounts of the price which said Great Western Smelters Corporation had contracted to pay said Tutwiler & Brooks for said coke f. o. b. cars at Holt, Alabama, and attached to said draft or drafts said bills of lading and forwarded said draft or drafts, with said bills of lading attached thereto, to a bank at Mayer, Arizona for collection, to deliver the said bills of lading to said Great Western Smelters Corporation upon payment by it of said draft or drafts; that said Great Western Smelters Corporation paid the amount of said draft or drafts to the said bank and received from it said bills of lading, endorsed by said Tutwiler & Brooks; that the Atchinson, Topeka & Santa Fe Railroad Company, the delivering carrier, collected from Great Western Smelters Corporation, as the freight on said coke, a sum of money, to-wit: Five Thousand Eighty-Two & 15/100 Dollars (\$5,082.15), and thereupon delivered said coke to said Great Western Smelters Corporation; and the defendant avers that said Great Western Smelters Corporation was at that time, and for a long time thereafter remained and continued to be a going and solvent concern, and the balance due as freight on said coke, and here sought to be recovered from this defendant, could have been collected from said Great Western Smelters Corporation by either said Atchinson, Topeka & Santa Fe Railroad Company, or by the plain-

tiff in this cause, if proper efforts and means to that end had been employed.

(9) The defendant for further plea to said complaint says that it contracted to sell and deliver, and did sell and deliver the coke mentioned in said complaint to the firm of Tutwiler & Brooks, of Birmingham, Alabama, at a fixed or stipulated price per ton, f. o. b. cars at Holt, Alabama, and in pursuance, and in accordance with the terms of said contract delivered said coke to the plaintiff on board cars at Holt, Alabama, for and on account of said Tutwiler & Brooks, and, under and in pursuance of instructions from them, consigned said coke to said Tutwiler & Brooks at Mayer, Arizona, and requested the plaintiff to issue, and it did issue bills of lading consigning said coke to "Order of Tutwiler & Brooks at Mayer, Arizona, Notify Great Western Smelters Corporation at Mayer, Arizona;" the party to whom said Tutwiler & Brooks had sold said coke. That this defendant made a complete unreserved and unqualified delivery of said coke to said Tutwiler & Brooks, f. o. b. cars at Holt, Alabama; and after said delivery retained no title or interest in said coke, but the same thereupon became the property of Tutwiler & Brooks, that said delivery of said coke to the plaintiff was made, and the issuance of said bills of lading by the plaintiff was procured by this defendant for and on account of, and in accordance with instructions from said Tutwiler & Brooks; and this defendant had in said coke, after its delivery to the plaintiff, no title or interest, but the same thereupon became and was the property of said Tutwiler & Brooks. This defendant, immediately upon

the receipt from the plaintiff of said bills of lading delivered the same to the said Tutwiler & Brooks, who endorsed the same and forwarded them, along with the draft or drafts drawn upon said Great Western Smelters Corporation for the purchase price of said coke, to a bank at Mayer, Arizona for collection, to deliver said bills of lading to Great Western Smelters Corporation upon payment by it of said draft; that said Tutwiler & Brooks had sold said coke to said Great Western Smelters Corporation at a fixed and stipulated price per ton f. o. b. cars at Holt, Alabama, and under the terms of said contract for sale, said Great Western Smelters Corporation was to pay the freight on said coke from Holt, Alabama, to Mayer, Arizona; that said Great Western Smelters Corporation paid said draft or drafts and received from said bank said bills of lading bearing the endorsement of Tutwiler & Brooks, and the Atchinson, Topeka & Santa Fe Railroad Company, the delivering carrier, collected from said Great Western Smelters Corporation a sum of money, to-wit: Five Thousand Eighty-Two & 15/100 Dollars (\$5,082.15), as freight on said coke, and upon payment of said sum, and the surrender of said bills of lading, delivered said coke to said Great Western Smelters Corporation; and neither said Atchinson, Topeka & Santa Fe Railroad Company nor the plaintiff, nor any connecting carrier of said coke, exhausted, prior to the institution of this suit, its remedies for collecting from said Great Western Smelters Corporation the balance due as freight upon said coke, and here sought to be recovered.

(10) The defendant for further plea to said com-

plaint, says that it contracted to sell and deliver, and did sell and deliver the coke mentioned in said complaint to the firm of Tutwiler & Brooks, of Birmingham, Alabama, at a fixed or stipulated price per ton f. o. b. cars at Holt, Alabama, and in pursuance and in accordance with the terms of said contract, delivered said coke to the plaintiff on board cars at Holt, Alabama, for and on account of said Tutwiler & Brooks, and under and in pursuance of instructions from them, consigned said coke to said Tutwiler & Brooks at Mayer, Arizona, and requested the plaintiff to issue, and it did issue bills of lading consigning said coke to "Order of Tutwiler & Brooks at Mayer, Arizona, Notify Great Western Smelters Corporation at Mayer, Arizona;" the party to whom said Tutwiler & Brooks had sold said coke. That this defendant made a complete unreserved and unqualified delivery of said coke to said Tutwiler & Brooks f. o. b. cars at Holt, Alabama, and after said delivery retained no title or interest in said coke, but the same thereupon became the property of said Tutwiler & Brooks, that said delivery of said coke to the plaintiff was made, and the issuance of said bills of lading by the plaintiff was procured by this defendant for and on account of, and in accordance with instructions from said Tutwiler & Brooks; and this defendant had in said coke, after its delivery to the plaintiff no title or interest, but the same thereupon became and was the property of said Tutwiler & Brooks. This defendant, immediately, upon the receipt from the plaintiff of said bills of lading delivered the same to the said Tutwiler & Brooks, who endorsed the same and forwarded them, along with the

draft or drafts drawn upon said Great Western Smelters Corporation for the purchase price of said coke to a bank at Mayers, Arizona for collection, to deliver said bills of lading to Great Western Smelters Corporation upon payment by it of said draft; that said Tutwiler & Brooks had sold said coke to said Great Western Smelters Corporation at a fixed and stipulated price per ton f. o. b. cars at Holt, Alabama, and under the terms of said contract of sale, said Great Western Smelters Corporation was to pay the freight on said coke from Holt, Alabama, to Mayer, Arizona; that said Great Western Smelters Corporation paid said draft or drafts and received from said bank said bills of lading bearing the endorsement of Tutwiler & Brooks, and the Atchinson, Topeka & Santa Fe Railroad Company, the delivering carrier, collected from said Great Western Smelters Corporation a sum of money, to-wit: Five Thousand Eighty-Two & 15/100 Dollars (\$5,082.15), as freight on said coke, and upon payment of said sum, and the surrender of said bills of lading delivered said coke to said Great Western Smelters Corporation, and could have collected from said Great Western Smelters Corporation the balance due as freight on said coke, and here sought to be recovered from this defendant, if it had employed proper efforts and means to that end.

(11) The defendant for further plea to said complaint says that it contracted to sell and deliver, and did sell and deliver the coke mentioned in said complaint to the firm of Tutwiler & Brooks, of Birmingham, Alabama, at a fixed or stipulated price per ton f. o. b. cars at Holt, Alabama, and in pursuance and in accordance

Minnesota State Court,
St. Paul, Minn.

with the terms of said contract delivered said coke to the plaintiff on board cars at Holt, Alabama, for and on account of said Tutwiler & Brooks, and under and in pursuance of instructions from them, consigned said coke to said Tutwiler & Brooks at Mayer, Arizona, and requested the plaintiff to issue, and it did issue bills of lading consigning said coke to "Order of Tutwiler & Brooks at Mayer, Arizona, Notify Great Western Smelters Corporation at Mayer, Arizona;" the party to whom said Tutwiler & Brooks had sold said coke. That this defendant made a complete unreserved and unqualified delivery of said coke to said Tutwiler & Brooks f. o. b. cars at Holt, Alabama; and after said delivery retained no title or interest in said coke, but the same thereupon became the property of said Tutwiler & Brooks, that said delivery of said coke to the plaintiff was made, and the issuance of said bills of lading by the plaintiff was procured by this defendant for and on account of, and in accordance with instructions from said Tutwiler & Brooks; and this defendant had in said coke, after its delivery to the plaintiff, no title or interest, but the same thereupon became and was the property of said Tutwiler & Brooks. This defendant, immediately upon the receipt from the plaintiff of said bills of lading delivered the same to the said Tutwiler & Brooks, who endorsed the same and forwarded them, along with the draft or drafts upon said Great Western Smelters Corporation for the purchase price of said coke, to a bank at Mayer, Arizona for collection, to deliver said bills of lading to Great Western Smelters Corporation upon payment by it of said draft; that said

Tutwiler & Brooks had sold said coke to said Great Western Smelters Corporation at a fixed and stipulated price per ton f. o. b. cars at Holt, Alabama, and under the terms of said contract of sale, said Great Western Smelters Corporation was to pay the freight on said coke from Holt, Alabama to Mayer, Arizona; that said Great Western Smelters Corporation paid said draft or drafts and received from said bank said bills of lading bearing the endorsement of Tutwiler & Brooks, and the Atchinson, Topeka & Santa Fe Railroad Company, the delivering carrier, collected from said Great Western Smelters Corporation a sum of money, to-wit: Five Thousand Eighty-Two & 15/100 Dollars (\$5,082.15), as freight on said coke, and upon payment of said sum, and the surrender of said bills of lading delivered said coke to said Great Western Smelters Corporation, and the defendant avers that said Great Western Smelters Corporation was at that time, and for a long time thereafter remained and continued to be a going and solvent concern, and the balance due as freight on said coke and here sought to be recovered from this defendant, could have been collected from said Great Western Smelters Corporation by either Atchinson, Topeka & Santa Fe Railroad Company, or by the plaintiff in this cause, if proper efforts and means to that end had been employed.

H. A. & D. K. JONES,

Defendant's Attorneys.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DIVISION OF THE NORTH-
ERN DISTRICT OF ALABAMA.

LOUISVILLE & NASHVILLE RAILROAD

Company, a Corporation, *Plaintiff.*

vs.

CENTRAL IRON & COAL COMPANY,

a Corporation, *Defendant.*

(5-A) The coke referred to in the said complaint was sold by this defendant to the firm of Tutwiler & Brooks of Birmingham, Alabama, at a fixed and stipulated price per ton, f. o. b. cars at Holt, Alabama; and said coke was sold by said Tutwiler & Brooks to Great Western Smelters Corporation of Mayer, Arizona, at a fixed or stipulated price per ton f. o. b. cars at Holt, Alabama, and under the terms of the contract of sale by Tutwiler & Brooks to Great Western Smelters Corporation, the said Great Western Smelters Corporation was to pay the freight upon said coke from Holt, Alabama to Mayer, Arizona; that under and in pursuance of instructions given by said Tutwiler & Brooks to this defendant, this defendant, for and on account of said Tutwiler & Brooks, delivered said coke to the plaintiff at Holt, Alabama, and, under and in pursuance of, and in accordance with instructions given this defendant by said Tutwiler & Brooks, this defendant consigned said coke to "Order of Tutwiler & Brooks, Mayer, Arizona, Notify Great Western Smelters Corporation at Mayer, Arizona;" that said coke became the property of said

Tutwiler & Brooks upon its delivery to the plaintiff at Holt, Alabama; that the bills of lading issued^d by the plaintiff for said coke were by this defendant at once delivered to said Tutwiler & Brooks, and said Tutwiler & Brooks thereupon endorsed said bills of lading and drew upon said Great Western Smelters Corporation a draft or drafts for the amount or amounts of the price which said Great Western Smelters Corporation had contracted to pay said Tutwiler & Brooks for said coke f. o. b. cars at Holt, Alabama, and attached to said draft or drafts said bills of lading and forwarded said draft or drafts, with said bills of lading attached thereto, to a bank at Mayer, Arizona for collection, to deliver the said bills of lading to said Great Western Smelters Corporation upon payment by it of said draft or drafts to the said bank and received from it said bills of lading, endorsed by said Tutwiler & Brooks; that Atchinson, Topeka & Santa Fe Railroad Company, the delivering carrier, collected from Great Western Smelters Corporation, as the freight on said coke, a sum of money, to-wit: Five Thousand Eighty-Two & 15/100 Dollars (\$5,082.15) and thereupon delivered said coke to said Great Western Smelters Corporation; and neither said Atchinson, Topeka & Santa Fe Railroad Co., nor the plaintiff, nor any connecting carrier of said coke prior to the institution of this suit against this defendant, made any effort to collect from said Tutwiler & Brooks the balance due as freight upon said coke, and here sought to be recovered from this defendant.

(6-A) The coke referred to in the said complaint was sold by this defendant to the firm of Tutwiler &

Brooks of Birmingham, Alabama, at a fixed and stipulated price per ton f. o. b. cars at Holt, Alabama; and said coke was sold by said Tutwiler & Brooks to Great Western Smelters Corporation at Mayer, Arizona at a fixed or stipulated price per ton f. o. b. cars at Holt, Alabama, and under the terms of the contract of sale by Tutwiler & Brooks to Great Western Smelters Corporation, the said Great Western Smelters Corporation was to pay the freight upon said coke from Holt, Alabama to Mayer, Arizona; that under and in pursuance of instructions given by said Tutwiler & Brooks to this defendant, this defendant, for and on account of said Tutwiler & Brooks delivered said coke to the plaintiff at Holt, Alabama, and, under and in pursuance of, and in accordance with instructions given this defendant by said Tutwiler & Brooks, this defendant consigned said coke to "Order of Tutwiler & Brooks, Mayer, Arizona, Notify Great Western Smelters Corporation at Mayer, Arizona;" that said coke became the property of said Tutwiler & Brooks upon its delivery to the plaintiff at Holt, Alabama; that the bills of lading issued by the plaintiff for said coke were by this defendant at once delivered to said Tutwiler & Brooks, and said Tutwiler & Brooks thereupon endorsed said bills of lading and drew upon said Great Western Smelters Corporation a draft or drafts for the amount or amounts of the price which said Great Western Smelters Corporation had contracted to pay said Tutwiler & Brooks for said coke f. o. b. cars at Holt, Alabama, and attached to said draft or drafts said bills of lading and forwarded said draft or drafts, with said bills of lading attached thereto, to

a bank at Arizona for collection, the said bills of lading to be delivered to said Great Western Smelters Corporation upon payment by it of said draft or drafts; that said Great Western Smelters Corporation paid the amount of said draft or drafts to the said bank and received from it said bills of lading, endorsed by said Tutwiler & Brooks; that the Atchinson, Topeka & Santa Fe Railroad Company, the delivering carrier, collected from Great Western Smelters Corporation, as the freight on said coke, a sum of money, to-wit: Five Thousand Eighty-Two & 15/100 Dollars (\$5,082.15), and thereupon delivered said coke to said Great Western Smelters Corporation; and neither said Atchinson, Topeka & Santa Fe Railroad Company nor the plaintiff, nor any connecting carrier of said coke, exhausted, prior to the institution of this suit, its remedies for collecting from said Tutwiler & Brooks the balance due as freight upon said coke, and here sought to be recovered.

(7-A) The coke referred to in the said complaint was sold by this defendant to the firm of Tutwiler & Brooks of Birmingham, at a fixed and stipulated price per ton f. o. b. cars at Holt, Alabama and said coke was sold by said Tutwiler & Brooks to Great Western Smelters Corporation at Mayer, Arizona at a fixed or stipulated price per ton f. o. b. cars at Holt, Alabama, and under the terms of the contract of sale by Tutwiler & Brooks to Great Western Smelters Corporation, the said Great Western Smelters Corporation was to pay the freight upon said coke from Holt, Alabama to Mayer, Arizona; that under and in pursuance of instructions given by said Tutwiler & Brooks to this defendant, this

defendant, for and on account of said Tutwiler & Brooks delivered said coke to the plaintiff at Holt, Alabama, and, under and in pursuance of, and in accordance with instructions given this defendant by said Tutwiler & Brooks, this defendant consigned said coke to "Order of Tutwiler & Brooks, Mayer, Arizona, Notify Great Western Smelters Corporation at Mayer, Arizona;" that said coke became the property of said Tutwiler & Brooks upon its delivery to the plaintiff at Holt, Alabama; that the bills of lading issued by the plaintiff for said coke were by this defendant at once delivered to said Tutwiler & Brooks, and said Tutwiler & Brooks thereupon endorsed said bills of lading and drew upon said Great Western Smelters Corporation a draft or drafts for the amount or amounts of the price which said Great Western Smelters Corporation had contracted to pay said Tutwiler & Brooks for said coke f. o. b. cars at Holt, Alabama, and attached to said draft or drafts said bills of lading and forwarded said draft or drafts, with said bills of lading attached thereto, to a bank at Mayer, Arizona for collection, the said bills of lading to be delivered to said Great Western Smelters Corporation upon payment by it of said draft or drafts; that said Great Western Smelters Corporation paid the amount of said draft or drafts to the said bank and received from it said bills of lading, endorsed by said Tutwiler & Brooks; that the Atchinson, Topeka & Santa Fe Railroad Company, the delivering carrier, collected from Great Western Smelters Corporation, as the freight on said coke, a sum of money, to-wit: Five Thousand Eighty-Two & 15/100 Dollars (\$5,082.15), and thereupon

delivered said coke to said Great Western Smelters Corporation; and could have collected from said Tutwiler & Brooks the balance due as freight on said coke, and here sought to be recovered from this defendant, if it had employed proper efforts and means to that end.

(8-A) The coke referred to in the said complaint was sold by this defendant to the firm of Tutwiler & Brooks of Birmingham, Alabama, at a fixed and stipulated price per ton f. o. b. cars at Holt, Alabama; and said coke was sold by said Tutwiler & Brooks to Great Western Smelters Corporation of Mayer, Arizona, at a fixed or stipulated price per ton f. o. b. cars at Holt, Alabama, and under the terms of the contract of sale by Tutwiler & Brooks to Great Western Smelters Corporation was to pay the freight upon said coke from Holt, Alabama to Mayer, Arizona; that under and in pursuance of instructions given by said Tutwiler & Brooks to this defendant, this defendant, for and on account of said Tutwiler & Brooks delivered said coke to the plaintiff at Holt, Alabama, and, under and in pursuance of, and in accordance with instructions given this defendant by said Tutwiler & Brooks, this defendant consigned said coke to "Order of Tutwiler & Brooks, Mayer, Arizona, Notify Great Western Smelters Corporation at Mayer, Arizona;" that said coke became the property of said Tutwiler & Brooks upon its delivery to the plaintiff at Holt, Alabama; that the bills of lading issued by the plaintiff for said coke were by this defendant at once delivered to said Tutwiler & Brooks, and said Tutwiler & Brooks thereupon endorsed said bills of lading and drew upon said Great Western Smelters Corporation a

draft or drafts for the amount or amounts of the price which said Great Western Smelters Corporation had contracted to pay said Tutwiler & Brooks for said coke f. o. b. cars at Holt, Alabama, and attached to said draft or drafts said bills of lading and forwarded said draft or drafts, with said bills of lading attached thereto, to a bank at Mayer, Arizona for collection, the said bills of lading to be delivered to said Great Western Smelters Corporation upon payment by it of said draft or drafts; that said Great Western Smelters Corporation paid the amount of said draft or drafts to the said bank and received from it said bills of lading, endorsed by said Tutwiler & Brooks; that the Atchinson, Topeka & Santa Fe Railroad Company, the delivering carrier, collected from Great Western Smelters Corporation, as the freight on said coke, a sum of money, to-wit: Five Thousand Eighty-Two & 15/100 Dollars (\$5,082.15), and thereupon delivered said coke to said Great Western Smelters Corporation; and the defendant avers that said Great Western Smelters Corporation was at that time, and for a long time thereafter remained and continued to be a going and solvent concern, and the balance due as freight on said coke, and here sought to be recovered from this defendant, could have been collected from said Tutwiler & Brooks by either said Atchinson, Topeka & Santa Fe Railroad Company, or by the plaintiff in this cause, if proper efforts and means to that end had been employed.

(9-A) The defendant for further plea to said complaint says that it contracted to sell and deliver, and did sell and deliver the coke mentioned in said complaint to the firm of Tutwiler & Brooks, of Birmingham, Ala-

bama, at a fixed or stipulated price per ton, f. o. b. cars at Holt, Alabama, and in pursuance, and in accordance with the terms of said contract delivered said coke to the plaintiff on board cars at Holt, Alabama, for and on account of said Tutwiler & Brooks, and, under and in pursuance of instructions from them, consigned said coke to said Tutwiler & Brooks at Mayer, Arizona, and requested the plaintiff to issue, and it did issue bills of lading consigning said coke to "Order of Tutwiler & Brooks at Mayer, Arizona, Notify Great Western Smelters Corporation at Mayer, Arizona;" the party to whom said Tutwiler & Brooks had sold said coke. That this defendant made a complete unreserved and unqualified delivery of said coke to said Tutwiler & Brooks, f. o. b. cars at Holt, Alabama; and after said delivery retained no title or interest in said coke, but the same thereupon became the property of said Tutwiler & Brooks, that said delivery of said coke to the plaintiff was made, and the issuance of said bills of lading by the plaintiff was procured by this defendant for and on account of, and in accordance with instructions from said Tutwiler & Brooks; and this defendant had in said coke, after its delivery to the plaintiff no title or interest, but the same thereupon became and was the property of said Tutwiler & Brooks. This defendant, immediately upon the receipt from the plaintiff of said bills of lading delivered the same to the said Tutwiler & Brooks, who endorsed the same and forwarded them, along with the draft or drafts drawn upon said Great Western Smelters Corporation for the purchase price of said coke, to a bank at Arizona for collection, said bills of lading

to be delivered to Great Western Smelters Corporation upon payment by it of said draft; that said Tutwiler & Brooks had sold said coke to said Great Western Smelters Corporation at a fixed and stipulated price per ton f. o. b. cars at Holt, Alabama, and under the terms of said contract of sale, said Great Western Smelters Corporation was to pay the freight on said coke from Holt, Alabama, to Mayer, Arizona; that said Great Western Smelters Corporation paid said draft or drafts and received from said bank said bills of lading bearing the endorsement of Tutwiler & Brooks, and the Atchinson, Topeka & Santa Fe Railroad Company, the delivering carrier, collected from said Great Western Smelters Corporation a sum of money, to-wit: Five Thousand Eighty-Two & 15/100 Dollars (\$5,082.15), as freight on said coke, and upon payment of said sum, and the surrender of said bills of lading, delivered said coke to said Great Western Smelters Corporation; and neither said Atchinson, Topeka & Santa Fe Railroad Company nor the plaintiff, nor any connecting carrier of said coke, exhausted, prior to the institution of this suit, its remedies for collecting from said Tutwiler & Brooks the balance due as freight upon said coke, and here sought to be recovered.

(10-A) The defendant for further plea to said complaint, says that it contracted to sell and deliver, and did sell and deliver the coke mentioned in said complaint to the firm of Tutwiler & Brooks, of Birmingham, Alabama, at a fixed or stipulated price per ton f. o. b. cars at Holt, Alabama, and in pursuance and in accordance with the terms of said contract, delivered said coke to

the plaintiff on board cars at Holt, Alabama, for and on account of said Tutwiler & Brooks, and under and in pursuance of instructions from them, consigned said coke to said Tutwiler & Brooks at Mayer, Arizona, and requested the plaintiff to issue, and it did issue bills of lading consigning said coke to "Order of Tutwiler & Brooks at Mayer, Arizona, Notify Great Western Smelters Corporation at Mayer, Arizona;" the party to whom said Tutwiler & Brooks had sold said coke. That this defendant made a complete unreserved and unqualified delivery of said coke to said Tutwiler & Brooks f. o. b. cars at Holt, Alabama, and after said delivery retained no title or interest in said coke, but the same thereupon became the rproperty of said Tutwiler & Brooks, that said delivery of said coke to the plaintiff was made, and the issuance of said bills of lading by the plaintiff was procured by this defendant for and on account of, and in accordance with instructions from said Tutwiler & Brooks; and this defendant had in said coke, after its delivery to the plaintiff, no title or interest, but the same thereupon became and was the property of said Tutwiler & Brooks. This defendant, immediately, upon the receipt from the plaintiff of said bills of lading delivered the same to the said Tutwiler & Brooks, who endorsed the same and forwarded them, along with the draft or drafts drawn upon said Great Western Smelters Corporation for the purchase price of said coke to a bank at Arizona for collection, said bills of lading to be delivered to Great Western Smelters Corporation upon payment by it of said draft; that said Tutwiler & Brooks had sold said coke to said Great Western

Smelters Corporation at a fixed and stipulated price per ton f. o. b. cars at Holt, Alabama, and under the terms of said contract of sale, said Great Western Smelters Corporation was to pay the freight on said coke from Holt, Alabama, to Mayer, Arizona; that said Great Western Smelters Corporation paid said draft or drafts and received from said bank said bills of lading bearing the endorsement of Tutwiler & Brooks, and the Atchinson, Topeka & Santa Fe Railroad Company, the delivering carrier, collected from said Great Western Smelters Corporation a sum of money, to-wit: Five Thousand Eighty-Two & 15/100 Dollars (\$5,082.15), as freight on said coke, and upon payment of said sum, and the surrender of said bills of lading delivered said coke to said Great Western Smelters Corporation, and could have collected from said Tutwiler & Brooks the balance due as freight on said coke, and here sought to be recovered from this defendant, if it had employed proper efforts and means to that end.

(11-A) The defendant for further plea to said complaint says that it contracted to sell and deliver, and did sell and deliver the coke mentioned in said complaint to the firm of Tutwiler & Brooks, of Birmingham, Alabama, the firm of Tutwiler & Brooks, of Birmingham, Ala., at a fixed or stipulated price per ton f. o. b. cars at Holt, Ala., and in pursuance and in accordance with the terms of said contract delivered said coke to the plaintiff on board cars at Holt, Alabama, for and on account of said Tutwiler & Brooks, and under and in pursuance of instructions from them, consigned said coke to said Tutwiler & Brooks at Mayer, Arizona, and requested the

plaintiff to issue, and it did issue bills of lading consigning said coke to "Order of Tutwiler & Brooks at Mayer, Arizona, Notify Great Western Smelters Corporation at Mayer, Arizona;" the party to whom said Tutwiler & Brooks had sold said coke. That this defendant made a complete unreserved and unqualified delivery of said coke to said Tutwiler & Brooks f. o. b. cars at Holt, Alabama; and after said delivery retained no title or interest in said coke, but the same thereupon became the property of said Tutwiler & Brooks, that said delivery of said coke to the plaintiff was made, and the issuance of said bills of lading by the plaintiff was procured by this defendant for and on account of, and in accordance with instructions from said Tutwiler & Brooks; and this defendant had in said coke, after its delivery to the plaintiff, no title or interest, but the same thereupon became and was the property of said Tutwiler & Brooks. This defendant, immediately upon the receipt from the plaintiff of said bills of lading delivered the same to the said Tutwiler & Brooks, who endorsed the same and forwarded them, along with the draft or drafts upon said Great Western Smelters Corporation for the purchase price of said coke, to a bank at Arizona for collection, said bills of lading to be delivered to Great Western Smelters Corporation upon payment by it of said draft; that said Tutwiler & Brooks had sold said coke to said Great Western Smelters Corporation at a fixed and stipulated price per ton f. o. b. cars at Holt, Alabama, and under the terms of said contract of sale, said Great Western Smelters Corporation was to pay the freight on said coke from Holt, Alabama to Mayer, Arizona; that

said Great Western Smelters Corporation paid said draft or drafts and received from said bank said bills of lading bearing the endorsement of Tutwiler & Brooks, and the Atchinson, Topeka & Santa Fe Railroad Company, the delivering carrier, collected from said Great Western Smelters Corporation a sum of money, to-wit: Five Thousand Eighty-Two & 15/100 Dollars (\$5,082.15), as freight on said coke, and upon payment of said sum, and the surrender of said bills of lading delivered said coke to said Great Western Smelters Corporation, and the defendant avers that said Tutwiler & Brooks was at that time, and for a long time thereafter remained and continued to be a going and solvent concern, and the balance due as freight on said coke and here sought to be recovered from this defendant, could have been collected from said Great Western Smelters Corporation by either Atchinson, Topeka & Santa Fe Railroad Company, or by the plaintiff in this cause, if proper efforts and means to that end had been employed.

H. A. & D. K. JONES,

Defendant's Attorneys.

PLAINTIFF'S DEMURRER TO PLEAS

Filed April 19, 1921

CHAS. J. ALLISON, Clerk

LOUISVILLE & NASHVILLE RAILROAD
COMPANY

vs.

CENTRAL IRON & COAL COMPANY

Comes the plaintiff and demurs to the 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th pleas on the following grounds, separately and severally, as to each:

(1) So far as plaintiff is concerned said plea does not deny that the contract of affreightment was between plaintiff and defendant.

(2) Plaintiff is not compelled to collect the freight of consignee but may collect either of the consignor or consignee.

(3) The plaintiff is not estopped from collecting the balance of freight due from the consignor by the fact that it collected a part of it from the consignee.

(4) It is immaterial, so far as plaintiff's right and duty to collect full freight for the shipment is concerned, who was the owner of the freight.

(5) Said plea constitutes no defense to the complaint.

(5) The neglect or default of the agent of the delivering carrier does not estop plaintiff from collecting the full freight due on the shipment from the consignor.

(6) Said plea does not aver that the full freight according to the schedules filed with the Interstate Commerce Commission was collected from the consignee.

And, plaintiff demurs to the pleas 5a, 6a, 7a, 8a, 9a, 10a and 11a, separately and severally as to each, on the same grounds as are introposed hereinabove to pleas 3, 4, 5, 6, 7, 8, 9, 10 and 11.

FOSTER, VERNER & RICE,
Plaintiff's Attorneys.

DEFENDANT'S PLEA 12

Filed October 28, 1921

CHAS. J. ALLISON, Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DIVISION OF THE NORTH-
ERN DISTRICT OF ALABAMA.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, a Corporation, *Plaintiff.*

vs.

CENTRAL IRON & COAL COMPANY,
a Corporation, *Defendant.*

Now comes Central Iron & Coal Company, defendant in the above stated cause, and for further plea to the complaint in said cause, says:

(12) The coke referred to in the said complaint was sold by this defendant to the firm of Tutwiler & Brooks of Birmingham, Alabama, at a fixed and stipulated price per ton, f. o. b. cars at Holt, Alabama; and said coke was sold by said Tutwiler & Brooks to Great Western Smelters Corporation of Mayer, Arizona, at a fixed or stipulated price per ton f. o. b. cars at Holt, Alabama, and under the terms of the contract of sale by Tutwiler & Brooks to Great Western Smelters Corporation, the said Great Western Smelters Corporation was to pay the freight upon said coke from Holt, Alabama to Mayer, Arizona; that under and in pursuance

of instructions given by said Tutwiler & Brooks to this defendant, this defendant, for and on account of said Tutwiler & Brooks, delivered said coke to the plaintiff at Holt, Alabama, and, under and in pursuance of, and in accordance with instructions given this defendant by said Tutwiler & Brooks, this defendant consigned said coke to "Order of Tutwiler & Brooks, Mayer, Arizona, Notify Great Western Smelters Corporation at Mayer, Arizona;" that said coke became the property of said Tutwiler & Brooks upon its delivery to the plaintiff at Holt, Alabama; that the bills of lading issued by the plaintiff for said coke were by this defendant at once delivered to said Tutwiler & Brooks, and said Tutwiler & Brooks thereupon endorsed said bills of lading and drew upon said Great Western Smelters Corporation a draft or drafts for the amount or amounts of the price which said Great Western Smelters Corporation had contracted to pay said Tutwiler & Brooks for said coke f. o. b. cars at Holt, Alabama, and attached to said draft or drafts said bills of lading and forwarded said draft or drafts, with said bills of lading attached thereto, to a bank at Mayer, Arizona for collection, with instructions to deliver the said bills of lading to said Great Western Smelters Corporation upon payment by it of said draft or drafts to the said bank; that said Great Western Smelters Corporation paid said draft or drafts to said bank and received from it said bills of lading, endorsed by said Tutwiler & Brooks; that Atchinson, Topeka & Santa Fe Railroad Company, the delivering carrier, collected from Great Western Smelters Corporation, as the freight on said coke, a sum of money, to-wit: Five

Thousand Eighty-Two and 15/100 Dollars (\$5,082.15) and thereupon delivered said coke to said Great Western Smelters Corporation; and neither said Atchinson, Topeka and Santa Fe Railroad Company nor the plaintiff, nor any connecting carrier of said coke prior to the institution of this suit against this defendant, made any effort to collect from said Great Western Smelters Corporation the balance due as freight upon said coke, and here sought to be recovered from this defendant. That at the time said Atchinson, Topeka & Santa Fe Railroad Company delivered said coke to said Great Western Smelters Corporation, said Railroad Company had in its possession either a sum of money which had been deposited with it, or a bond which had been made to it by said Great Western Smelters Corporation for the purposes of paying, or for the purposes of securing the payment of any money which might become due from said Great Western Smelters Corporation to said Atchinson, Topeka & Santa Fe Railroad Company as freight on any goods consigned to said Great Western Smelters Corporation, and which might be delivered to it by said Railroad Company without the payment in advance of the freight, or carrying charges thereon, and could have collected from said Great Western Smelters Corporation the alleged undercharge of freight sued for in this action, at any time up to the date of the institution of this suit.

H. A. & D. K. JONES,
Defendant's Attorneys.

PAINTIFF'S DEMURRER TO PLEA 12

Filed October 28, 1921

CHAS. J. ALLISON, Clerk

*IN UNITED STATES DISTRICT COURT, WEST-
ERN DIVISION OF NORTHERN DISTRICT.*

No. 111

LOUISVILLE & NASHVILLE RAILROAD CO.

vs.

CENTRAL IRON & COAL COMPANY

Comes the plaintiff and demurs to the defendant's plea No. 12 and assigns the same grounds of demurrer which are assigned to defendant's pleas 3rd, 4th, 5th, 6th, 7th, 9th, 10th and 11th, and also assigns the following additional grounds:

(a) The allegation that at the time the said coke was delivered to Great Western Smelters Corporation that corporation had either a sum of money or a bond deposited with the A. T. & S. F. Ry. Co., for the purpose of paying or securing payment of any sum which might be or become due to said Railroad Company on any goods consigned to Great Western Smelters Corporation for freight or carrying charges thereon, is not equivalent to an allegation that the lawful freight on said coke was paid to said A. T. & S. F. R. R. Co., and hence the plea is no defense to the complaint.

(b) Said plea does not allege that at the time the alleged undercharge on said coke was discovered the said A. T. & S. F. R. R. Co., had any money of Great Western Smelters Corporation in its possession or bond of said Smelters Corporation, out of which it could have collected such undercharge, or which it held for the purpose of collecting or securing the collection of any freight charges then due on freight or goods shipped to Great Western Smelters Corporation, or goods which had been delivered to said Corporation.

FOSTER, VERNER & RICE,
Attorneys for Plaintiff.

COURT RECORD
JUDGMENT

FRIDAY, OCTOBER 28TH, 1921

The District Court of the United States for the Western Division of the Northern District of Alabama, met pursuant to adjournment. Present: Honorable W. I. Grubb, United States District Judge, Northern District of Alabama, presiding; Hon. Erle Pettus, United States Attorney; H. A. Skeggs, United States Marshal, and Chas. J. Allison, Clerk.

LOUISVILLE & NASHVILLE RAILROAD CO.

vs.

CENTRAL IRON & COAL COMPANY

This cause coming on to be heard, this day, come the parties herein by counsel, and in person, defendant submit pleas, and plaintiff interposes demurrers to defendant's pleas and said demurrers being heard and considered by the Court, it is ordered and adjudged by the Court that said demurrers be and are hereby sustained to all pleas, except plea 12, and it is ordered and adjudged by the Court that said demurrers to plea 12 be and are hereby overruled.

Thereupon issue being joined on plaintiff's complaint, and defendant's plea 12, to try this cause comes a jury of good and lawful men, to-wit: V. W. Malone, and eleven others duly empanelled, tried and sworn, and the trial of this cause is begun.

After the introduction of the evidence, the argument of counsel, and the oral charge delivered by the Court, directing a verdict for the defendant, the jury returned in open Court the following verdict, which was read by the Clerk, to-wit: "We the jury find for the defendant. V. W. Malone, Foreman."

Thereupon, it is ordered and adjudged by the Court that said defendant go hence without a day in respect to this cause and that the plaintiff be taxed with all costs herein accrued for which costs an execution may issue.

BILL OF EXCEPTIONS
 Filed February 4, 1922
 CHAS. J. ALLISON, Clerk

LOUISVILLE & NASHVILLE RAILROAD
 COMPANY, a Corporation, *Plaintiff*.

vs.

No. 111

CENTRAL IRON & COAL COMPANY,
 a Corporation, *Defendant*.

IN THE DISTRICT COURT OF THE UNITED
 STATES FOR THE WESTERN DIVISION OF
 THE NORTHERN DISTRICT OF ALABAMA,
 SITTING AT TUSCALOOSA, ALABAMA.

BE IT REMEMBERED, that on the trial of the
 above entitled cause in the District Court of the United
 States for the Western Division of the Northern Dis-
 trict of Alabama, at Tuscaloosa, Alabama, commencing
 on the 27th day of October, 1921, the Honorable W. I.
 Grubb, Judge, then and there presiding, and a jury, the
 following proceedings were had.

PLAINTIFF'S EVIDENCE

Plaintiff introduced in evidence the original bills of
 lading on which the coke moved for an undercharge on
 the freight and charges on which this suit was brought,
 which bills of lading were in words and figures as fol-
 lows, to-wit:

L&N Standard Form Order Bill of Lading Form 1030-2

Arrangement of colors and form in manifolding, on shipments consigned "to Order": (1) Shipping Order (blue); (2) Bill of Lading (yellow); (3) Memorandum (blue).

Louisville & Nashville Railroad Company
Order Bill of Lading—Original

Shipper's No. 5620

Agent's No. -----

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading, at Holt, Alabama, Jan. 7, 1917, from Central Iron & Coal Company the property described below, in apparent good order, except as noted (contents and conditions of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agreed to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including *conditions on back hereof*), and which are agreed to by the shipper and accepted for himself and his assigns.

This Bill of Lading is assignable; it is negotiable only in so far as may be required to carry out the promise

of the carrier made in the following surrender clause, and is enforceable as provided in Section 10 of this bill of lading, according to its original tenor and effect.

The surrender of this Original order Bill of Lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

The rate of freight from Holt to Mayer, Arizona, is in Cents per 100 Lbs.

If.....times 1st class	If 1st class	If 2d class	If Rule 25	If 3d class	If Rule 26	If 4th class
If 5th class	If 6th class	If Class A	If Class B	If Class C	If Class D	If Class E
If Class H	Per bar- rel If Class F	If Special per-----	(Mail address—Not for purpose of Delivery)			

Consigned to ORDER OF Tutwiler & Brooks, Destination, Mayer, State of Arizona, County of-----
 Notify Great Western Smelters Corporation, at Mayer, State of Arizona, County of-----
 Route: L&N : SP at New Orleans, AT&SF at El Paso.
 Car Initial-----

Car No.	No. Packages	Description of articles and special marks	Weight (Subject to Correction)	Class or rate	Check Column
AH&SA 62149	Coke	122900			
NO to Mayer WB 1565 Jan 13-17		350			
Mayer FB 545 2/19		87900			
AH&SA 62148	Coke	120800			
New Orleans to Mayer WB					
1566 1/13		348			
Mayer FB 107 2/4		86000			
H&TC 62329	Coke	117800			
New Orleans to Mayer WB					
1568 Jan. 13, 1917		346			
Mayer FB 73 Feb. 2, 1917		83200			
Central Iron & Coal Co., WNP					
M. A. Yarbrough, Agent.					

Immediately to the right of Check Column the following clauses appear:

If charges are to be prepaid, write or stamp here,

Received \$-----to apply in prepayment of
"To be Prepaid." -----

Received \$-----to apply in prepayment of
the charges on the property described hereon-----,
Agent or Cashier, per----- Charges Advanced:
\$-----

On the face of this Original Order Bill of Lading appears the following stamp. S. F. P. & P. Ry. P. & E.
R. R. Jan. 20, 1916. MAYER.

Conditions

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negli-

gence of the carrier or party in possession, the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes; or for country damage on cotton. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence.

In case of quarantine the goods may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations, or authorities, or for the carrier's dispatch, or at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when goods are so discharged, or goods may be returned by carriers at owner's expense and risk to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to goods shall be borne by the owners of the goods or be a lien thereon. The carriers shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required by quarantine regulations or authorities, even though same may have been done by carrier's officers, crew, agents or employees, nor for detention, loss or damage of any

kind occasioned by quarantine or the enforcement thereof.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage was by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computa-

tion, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal

holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains, or until loaded into and after unloaded from vessels.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the pub-

lished classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight, and average, if any, and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in Section 3, hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no such carrier or party in possession shall be liable for any loss or damage resulting from fire, or for any loss or damage resulting from the perils of the lakes, sea or other waters; or from vermin, leakage, chafing, breakage, heat, frost, wet, explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances, whether existing prior to,

at the time of, or after sailing; or unseaworthiness; or from colision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at any port or ports, to tow and be towed, to transfer, to transship, to lighter, to load and discharge goods at any time and assist vessels in distress, and to deviate for the purpose of saving life or property. Such water carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry such property upon deck.

The term "water carriage" in this section shall not be construed as including literage across rivers or in lake or other harbors when performed by the rail carrier, and the liability for such lighterage shall be governed by the other sections of this instrument.

Section 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

In addition to the bill of lading, a copy of which is set out immediately hereinabove, the plaintiff introduced three other bills of lading identical with that, a copy of which is hereinabove set out in all particulars, except as to the number of cars and the weights of the coke in the several cars. The aggregate weight of the coke in all the cars covered by the four bills of lading introduced in evidence by plaintiff, as shown by said bills of lading,

was Eight Hundred Twenty-Six Thousand and Six Hundred (826,600) pounds.

It was thereupon admitted in open court by the defendant that the routing on the said bills of lading was written into the same by an agent of the defendant, so as to dispense with formal proof of that fact.

The plaintiff then introduced in evidence certified copies of the schedule of freight charges for the route over which the said coke was shipped, as the said tariff schedules appeared on file with the Interstate Commerce Commission. The combined aggregate of said freight rates from Holt, Alabama, to Mayer, Arizona, amounted to \$21.00 per ton of 2,000 pounds.

The plaintiff then introduced in evidence a written stipulation signed by the attorneys for the plaintiff and the attorneys for the defendant, showing the amount of freight which had been paid by Great Western Smelters Corporation at Mayer, Arizona, when the said coke was delivered to said Great Western Smelters Corporation, which stipulation was in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, a Corporation, *Plaintiff.*

vs.

CENTRAL IRON & COAL COMPANY,
a Corporation, *Defendant.*

It is agreed between the parties that the amount of

transportation charges actually paid for the transportation of the shipments of coke mentioned in the complaint is \$5,082.15 and that either party may introduce this agreement as evidence of the amount of such charges actually paid and that neither shall be required to prove the same in any other way.

FOSTER, VERNER & RICE,
Attorneys for Plaintiff.
HENRY A. JONES,
Attorney for Defendant.

The plaintiff then introduced in evidence the deposition of Herman A. Wagner, of Mayer, Arizona, whose deposition was taken on behalf of the plaintiff, which deposition and the direct and cross interrogatories propounded to said witness and the defendant's objection to the direct interrogatories were as follows:

Interrogatories propounded by the plaintiff to Herman A. Wagner, of Mayer, Arizona, a material witness for the plaintiff in the suit of Louisville & Nashville Railroad Company, a corporation, plaintiff, vs. Central Iron & Coal Company, a corporation, defendant, now pending in the District Court of the United States for the Western Division of the Northern District of Alabama.

Interrogatory I.

(a) What is your name, age, occupation, and where do you reside?

(b) Where did you reside between January 1, 1917, and January 1, 1918?

(c) Are you employed by, or in anywise interested in the Louisville & Nashville Railroad Company, or the Atchinson, Topeka & Santa Fe Railway Company?

(d) What is your business or occupation now, and what was it during the year 1917?

Interrogatory II.

(a) If you have said that you resided at Mayer, Arizona, in the State of Arizona, or near there, during the year 1917, please state whether you know anything of the Great Western Smelters Corporation, and its business and property during that year.

(b) Have you known anything of that corporation's business and property since the year 1917?

(c) If so, what was its business during the year 1917, and since that time?

(d) Did it build or partially build an industrial plant near Mayer, Arizona, during 1917, or afterwards?

(e) If so, did it ever operate such plant?

(f) How long, and during what years and what parts of years did it operate its plant?

(g) Did it close down and abandon its operations?

(h) If so, when did it cease and abandon operations?

(i) Was its business successful, or was it a failure?

(j) Was its property sold?

(k) If so, was it sold at voluntary or involuntary sale?

(l) When was it sold?

(m) What was the total price realized from its sale?

Interrogatory III.

(a) If you have said that the Great Western Smelters Corporation ceased or abandoned the operation of its business, please state whether or not it afterwards had any officers, agents, or employees at Mayer, or at its plant; and if so, whether they carried on any business there for the said corporation after it abandoned the operation of its plant.

(b) Did it have any care takers of the property after it ceased operations? If so, did such care takers carry on any business for said corporation?

Interrogatory IV.

(a) Of what did the property of the Great Western Smelters Corporation consist?

(b) What was the greatest value of its property at any time between January 1st, 1917, and the time it was sold, if it has been sold?

(c) If it has not been sold, what was its greatest value at any time between January 1st, 1917, and the present time?

Interrogatory V.

(a) Do you know whether or not Mr. John Borg, of New York City, had a duly recorded mortgage on all the property of the Great Western Smelters Corporation?

(b) If you have said that Mr. Borg had a mortgage

on all of the said property, please state whether the mortgage was placed on it prior to January, 1917.

(c) What was the amount of the debt secured by the Borg mortgage?

(d) Was there any other mortgage or lien of any kind on any of said corporation's property? If so, state what kind of lien it was, what property it was on, and the amount of the lien debt.

(e) Did the value of the said Great Western Smelters Corporation ever equal in amount the mortgage, and lien debts on said property, or were such debts largely in excess of the value of the property?

(f) Do you know of any property said corporation owned in 1917, or since then, which was not encumbered by the mortgages and liens? If so, please state what such unencumbered property consisted of and its value.

(g) Was all of said corporation's property sold under any mortgage or lien? If so, please state under what mortgage or lien it was sold, whether it was sold at public outcry, or private sale, when was it sold, and what it brought at such sale.

(h) Did it bring the amount of the balance then owing on the mortgage or lien indebtedness against it?

(i) Since such sale, has the Great Western Smelters Corporation had or owned any property that you know of?

Now comes Central Iron & Coal Company, defendant in the above stated cause and makes and filed the following objections to the interrogatories propounded by

Louisville & Nashville Railroad Company, plaintiff in the above stated cause to Herman A. Wagner, as a witness for the plaintiff in said cause.

The defendant objects to sub-division (i) of Interrogatory II, upon the following grounds:

(1) The same is illegal, incompetent, irrelevant and immaterial.

(2) The same calls for testimony which would be illegal, incompetent, and immaterial and irrelevant.

(3) The same calls for the opinion or conclusion of the witness.

(4) The same does not call for, and cannot be answered by the statement by the witness of a fact.

The defendant objects to sub-division (j) of Interrogatory II, upon the following grounds:

(1) The same is illegal, incompetent, irrelevant and immaterial.

(2) The same calls for testimony which would be illegal, incompetent, and immaterial and irrelevant.

(3) The same calls for hearsay or secondary evidence.

The defendant objects to sub-division (k) of Interrogatory II, upon the following grounds:

(1) The same is illegal, incompetent, irrelevant and immaterial.

(2) The same calls for testimony which would be illegal, incompetent, and immaterial and irrelevant.

(3) The same calls for hearsay and secondary evidence.

(4) The same calls for the opinion or conclusion of the witness.

The defendant objects to sub-division (l) of Interrogatory II, upon the following grounds:

(1) The same is illegal, incompetent, irrelevant and immaterial.

(2) The same calls for testimony which would be illegal, incompetent, irrelevant and immaterial.

(3) The same calls for hearsay or secondary evidence.

(4) The same calls for the opinion or conclusion of the witness.

The defendant objects to sub-division (m) of Interrogatory II, upon the following grounds:

(1) The same is illegal, incompetent, irrelevant and immaterial.

(2) The same calls for testimony which would be illegal, incompetent, irrelevant and immaterial.

(3) The same calls for hearsay or secondary evidence.

(4) The same calls for the opinion or conclusion of the witness.

(5) The same calls upon the witness to make a statement in reference to a fact with reference to which he is not shown to have any knowledge.

The defendant objects to sub-division (a) of Interrogatory IV, upon the following grounds:

(1) The same is illegal, incompetent, irrelevant and immaterial.

(2) The same calls for testimony which would be illegal, incompetent, irrelevant and immaterial.

(3) The same calls for a statement by the witness in reference to facts of which he is not shown to have knowledge.

(4) The same calls for the opinion or conclusion of the witness as an expert on a subject on which he is not shown to be an expert.

The defendant objects to sub-division (b) of Interrogatory IV, upon the following grounds:

(1) The same is illegal, incompetent, irrelevant and immaterial.

(2) The same calls for testimony which would be illegal, incompetent, irrelevant and immaterial.

(3) The same calls for a statement by the witness in reference to facts of which he is not shown to have knowledge.

(4) The same calls for the opinion or conclusion of the witness as an expert on a subject on which he is not shown to be an expert.

The defendant objects to sub-division (c) of Interrogatory IV, upon the following grounds:

(1) The same is illegal, incompetent, irrelevant and immaterial.

(2) The same calls for testimony which would be illegal, incompetent, irrelevant and immaterial.

(3) The same calls for a statement by the witness in reference to facts of which he is not known to have knowledge.

(4) The same calls for the opinion or conclusion of the witness as an expert on a subject on which he is not shown to be an expert.

The defendant objects to sub-division (a) of Interrogatory V, upon the following grounds:

(1) The same is illegal, incompetent, irrelevant and immaterial.

(2) The same calls for testimony which would be illegal, incompetent, irrelevant and immaterial.

(3) The same calls for the opinion or conclusion of the witness.

(4) The same calls for hearsay or secondary evidence.

(5) The same calls for evidence of the contents of a supposed written instrument, without having accounted for the original of said instrument.

(6) The same calls for testimony which is not the best, but is secondary evidence.

The defendant objects to sub-division (b) of Interrogatory V, upon the following grounds:

(1) The same is illegal, incompetent, irrelevant and immaterial.

(2) The same calls for testimony which would be illegal, incompetent, irrelevant and immaterial.

(3) The same calls for the opinion or conclusion of the witness.

(4) The same calls for hearsay or secondary evidence.

(5) The same calls for evidence of the contents of a supposed written instrument, without having accounted for the original of said instrument.

(6) The same calls for testimony which is not the best, but is secondary evidence.

The defendant objects to sub-division (c) of Interrogatory V, upon the following grounds:

(1) The same is illegal, incompetent, irrelevant and immaterial.

(2) The same calls for testimony which would be illegal, incompetent, irrelevant and immaterial.

(3) The same calls for the opinion or conclusion of the witness.

(4) The same calls for hearsay or secondary evidence.

(5) The same calls for evidence of the contents of a supposed written instrument, without having accounted for the original of said instrument.

(6) The same calls for testimony which is not the best, but is secondary evidence.

The defendant objects to sub-division (d) of Interrogatory V, upon the following grounds:

(1) The same is illegal, incompetent, irrelevant and immaterial.

(2) The same calls for testimony which would be illegal, incompetent, irrelevant and immaterial.

(3) The same calls for the opinion or conclusion of the witness.

(4) The same calls for hearsay or secondary evidence.

(5) The same calls for evidence of the contents of a supposed written instrument, without having accounted for the original of said instrument.

(6) The same calls for testimony which is not the best, but is secondary evidence.

The defendant objects to sub-division (e) of Interrogatory V, upon the following grounds:

(1) The same is illegal, incompetent, irrelevant and immaterial.

(2) The same calls for testimony which would be illegal, incompetent, irrelevant and immaterial.

(3) The same calls for the opinion or conclusion of the witness.

(4) The same calls for hearsay or secondary evidence.

(5) The same calls for evidence of the contents of a supposed written instrument, without having accounted for the original of said instrument.

(6) The same calls for testimony which is not the best, but is secondary evidence.

(7) The same is involved, incomplete and unintelligible.

(8) The same calls for the institution by the witness of a comparison between two supposed sums or amounts.

The defendant objects to sub-division (f) of Interrogatory V, upon the following grounds:

(1) The same is illegal, incompetent, irrelevant and immaterial.

(2) The same calls for testimony which would be illegal, incompetent, irrelevant and immaterial.

(3) The same calls for the opinion or conclusion of the witness.

(4) The same calls for hearsay or secondary evidence.

(5) The same calls for evidence of the contents of a supposed written instrument, without having accounted for the original of said instrument.

(6) The same calls for testimony which is not the best, but is secondary evidence.

The defendant objects to the following portion of sub-division (g) of Interrogatory V, "Was all of said corporation's property sold under any mortgage or lien; if so, please state under what mortgage or lien it was sold," upon the following grounds:

(1) The same is illegal, incompetent, irrelevant and immaterial.

(2) The same calls for testimony which would be illegal, incompetent, irrelevant and immaterial.

(3) The same calls for the opinion or conclusion of the witness.

(4) The same calls for hearsay or secondary evidence.

(5) The same calls for evidence of the contents of a supposed written instrument, without having accounted for the original of said instrument.

(6) The same calls for testimony which is not the best, but is secondary evidence.

The defendant objects to sub-division (h) of Interrogatory V, upon the following grounds:

(1) The same is illegal, incompetent, irrelevant and immaterial.

(2) The same calls for testimony which would be illegal, incompetent, irrelevant and immaterial.

(3) The same calls for the opinion or conclusion of the witness.

(4) The same calls for hearsay or secondary evidence.

(5) The same calls for evidence of the contents of a supposed written instrument, without having accounted for the original of said instrument.

(6) The same calls for testimony which is not the best, but is secondary evidence.

And now without waiving all or any of the foregoing objections, but still insisting upon each and every one of said objections separately and severally, the defendant propounds to the said witness Herman A. Wagner, the following cross-interrogatories:

Cross Interrogatory I.

(a) Were you ever employed by Great Western Smelters Corporation? If so, during what period were you so employed, what position did you occupy, and what were your duties in that position?

(b) If you have stated that you know something of the business of Great Western Smelters Corporation, please state at length how you acquired such knowledge as you have of its affairs.

(c) Did you ever occupy a position in which it became your duty to inform yourself and to know what property Great Western Smelters Corporation owned? If so, please state what said position was, and what steps you took to inform yourself in reference to what property said corporation owned.

(d) From what source or sources did you acquire such knowledge as you have with reference to what property said corporation owned?

Cross Interrogatory II.

(a) Was Great Western Smelters Corporation actively engaged in any business between the first day of January, 1917, and the first day of January, 1918? If so, during what portion or portions of said period was it so engaged?

(b) Please state definitely and fully the nature and character of the business in which Great Western Smelters Corporation was engaged during the period extending from January 1st, 1917, to January 1st, 1918, stating all of the different kinds of business and occupations, and all of the branches of such business and occupation in which it was engaged.

(c) Do you know all of the property which Great Western Smelters Corporation owned, and all which came into its possession during the period extending from February 3rd, 1917, to January 1st, 1918? If so, please state fully and in detail what said property was, giving a complete list of the same, and the value of each article or item thereof in so far as you know.

(d) Is it not true that Great Western Smelters Corporation was actively engaged in business during the period extending from February 2nd, 1917, to November 1st, 1917, and was it not during that period constantly buying and acquiring personal property, and using or converting or disposing of the same?

(e) Did not said Great Western Smelters Corporation during said period acquire large quantities of personal property of different kinds which came into its possession at various times during said period, and was used or disposed of by it during said period?

(f) If so, please state, as nearly as you can, the several different kinds of said property, where it was held or kept by said Great Western Smelters Corporation, and what use or disposition was made of it?

(g) Was not said Great Western Smelters Corporation, during the period mentioned, an active, going concern, buying, using and selling personal property in the open market?

Cross Interrogatory III.

(a) Was all of the personal property of all of every sort, kind and description which Great Western Smelters Corporation owned or acquired, or had in its possession during the period extending from the 2nd day of February, 1917, to the 1st day of November, 1917, covered by or subject to any mortgage, lien, or other encumbrance? If so, was such mortgage, lien or other incumbrance in by operation of law, or what was the nature of the same? writing, or verbal, or one created or existing under or

(b) If you state that said mortgage, lien or other incumbrance was in writing, please attach to your answer to this interrogatory a copy of the same, or of each of the same, if there were more than one of them.

(c) If you have stated that said mortgage, lien or

other incumbrance was not in writing, then please state fully the nature, character, and substance of the same, stating all that you know about it or them.

(d) Do you desire to be understood as stating that Great Western Smelters Corporation never, at any time between February 2nd, 1917, and November 1st, 1917, owned or had in its possession any personal property whatever which was not subject to a mortgage, lien or other incumbrance?

(e) If so, please state fully and in detail how you know this, or on what facts you base your statement to that effect.

Cross Interrogatory IV.

(a) Do you know whether Great Western Smelters Corporation ever had in its possession, or on deposit in any bank, either in Mayer, Arizona, or elsewhere, during the period extending from February 2nd, 1917, to November 1st, 1917, any money?

(b) Do you know each and all of the sums of money which Great Western Smelters Corporation collected, received, or had in its possession during the entire period extending from the 2nd day of February, 1917, to the 1st day of November, 1917?

(c) If so, please state fully, at length, and in detail, the amount of each and every one of said sums, when and from what source each of said sums was derived or received, and what disposition was made of each of said

sums, and the date on which each of said sums was disposed of?

(d) Is it not a fact that Great Western Smelters Corporation was actively and constantly collecting and receiving and paying out money during the period extending from February 2nd, 1917, to November 1st, 1917?

Cross Interrogatory V.

(a) What shipments of freight, express, material, goods or other property of any and every kind, did Great Western Smelters Corporation receive or accept from any and every railroad or other carrier during the year 1917?

(b) Please give the dates such goods or property was received or accepted by or delivered to Great Western Smelters Corporation, and the kind, description and value of each shipment?

(c) What was the amount of freight, express or carrying charges on each shipment, and was each of said items of carrying charges paid by Great Western Smelters Corporation upon receipt of each shipment?

Cross Interrogatory VI.

(a) Please state what banks in Mayer, Prescott or elsewhere Great Western Smelters Corporation did business with, or had account or transactions with during the year 1917?

(b) What balances for each month, week and day of the year 1917 did Great Western Smelters Corporation have at each of said banks?

Deposition of Herman A. Wagner

For answer to Interrogatory I, he says:

(a) My name is Herman A. Wagner; my age is 57 years. My occupation is that of consulting engineer. I reside at Mayer, Arizona.

(b) Between January 1, 1917, and January 1, 1918, I resided at Mayer, Arizona.

(c) I am not employed by, or in any way interested in the Louisville & Nashville Railroad Company, or the Atchinson, Topeka & Santa Fe Railway Company.

(d) My business is that of consulting engineer and it was the same during the year 1917.

For answer to Interrogatory II, he says:

(a) I know in a general way something about the Great Western Smelters Corporation and its business and property during the year 1917.

(b) I have known something about that corporation's business and property since the year 1917.

(c) During 1917 they purchased, under a certain contract, ores from the Big Ledge Copper Company; they smelted same in their furnace and sold the resulting matte; in the fall or late summer of 1917, they shut down, have been shut down ever since. The property was sold by the Sheriff to the only bond holder, one John Borg of New York.

(d) The Great Western Smelters Corporation bought the old Treadwell Smelter just outside of Mayer,

Arizona, in 1916, made some alterations in it and partially erected an addition thereto during 1917.

(e) Yes, they did operate such a smelter plant.

(f) The company operated the smelter about sixty (60) days in 1917, I believe, in May and June.

(g) Yes, it closed down and abandoned its operations.

(h) My recollection is that it did cease and abandon operations in the latter part of June, 1917.

(i) Its business was not successful—it was a failure.

(j) Its property was sold.

(k) The property was sold at an involuntary sale during the month of November, 1920.

(m) The consideration bid at the Sheriff's Sale was approximately \$150,000.00, which was one-half of the \$30,000.00 bond issue which had been foreclosed and led to the Sheriff's Sale.

For answer to Interrogatory III, he says:

(a) After they ceased to operate at the plant, they maintained several watchmen there for a while, and then maintained one watchman there until the plant was sold recently, but they did not carry on any other business for the corporation.

(b) This is already answered by "a" above.

For answer to Interrogatory IV, he says:

(a) The property of the Great Western Smelters

Corporation consisted of the land upon which the smelter was located, the Treadwell Smelter above referred to, and certain second-hand materials purchased to be used in the extension of the smelter and certain machinery which was already in the Treadwell Smelter.

(b) In my opinion the greatest value of its property any time between January 1, 1917, and the time it was sold, would have been about \$35,000.00 if the plant had been sold during the war period.

(c) It has been sold and the answer to "b" above covers this point.

For answer to Interrogatory V, he says:

(a) Mr. John Borg, of New York City, had a duly recorded mortgage for all the property of Great Western Smelters Corporation.

(b) I do not know when the mortgage was placed on the property.

(c) My understanding is that the amount of the debt secured by the Borg mortgage was \$300,000.00.

(d) There was another lien on the property of said corporation; it was a chattel mortgage on the machine tools in the machine shop. It was in the neighborhood of \$1,600.00, I have forgotten the exact figures.

(e) In my opinion, the value of the property of the corporation did not equal the amount of the mortgage and lien debts on said property, and I believe that the debts were largely in excess of the value of the property.

(f) I do not know whether the corporation owned any property in 1917, not encumbered by mortgage or lien.

(g) The smelter located near Mayer was sold under the John Borg mortgage under foreclosure of bonds held by Mr. Borg, which amounted to \$300,000.00. It was sold at public Sheriff's Sale in the month of November, 1920, about the 23rd day of said month, and the bid made was for about one-half of said bonds, to-wit, about \$150,000.00.

(h) The bid was for approximately one-half of the mortgage indebtedness.

(i) I do not know whether they have had any other property since the sale of the smelter.

For answer to Cross-Interrogatory I, he says:

(a) I never was employed by the Great Western Smelters Corporation.

(b) I was living at Mayer at the time when the smelter was bought and the alterations made in it and during the time it was being operated, and therefore know those facts. Later, after Mr. Borg had purchased the smelter under his foreclosure, I purchased it from him and sold it to a third party, and therefore knew about the various mortgages and liens thereon.

(c) I did occupy a position which made it necessary for me to inform myself and to know of the property the Great Western Smelters Corporation owned.

In 1917 I represented eastern clients and I searched the records of Yavapai County.

(d) This is covered in answer to "c."

In answer to Cross-Interrogatory II, he says:

(a) The Great Western Smelters Corporation was actively engaged in smelting ore for a part of the time between January, 1917, and January, 1919. It was so engaged during May and June of said period.

(b) During the time specified in 1917, the Great Western Smelters Corporation was actively engaged in smelting ores of the Big Ledge Copper Company; together with certain custom ores purchased from outside parties. I know of no other kinds of business or branches of such business in which it was engaged.

(c) I know of all of the property which said Great Western Smelters Corporation owned at Mayer, Arizona. I know of none which came into its possession other than referred to above, during the period from February 3, 1917, to January 1, 1918. The property, as far as I know, consisted of the ground upon which the smelter was located, the old Treadwell Smelter which was purchased by the company, which contained furnace and other machinery, and some second-hand machinery and tools purchased by the Great Western Smelters Corporation from the United Verde Copper Company, and certain new tools in the machine shop, which was covered by chattel mortgage above referred to. I am not in a position at the present time to give an itemized list of each article and the value thereof.

(d) As stated above, the Great Western Smelters Corporation was engaged in smelting ores during the months of May and June, 1917, or approximately a period of sixty (60) days; thereafter it continued certain construction work during the month of July, 1917, and thereafter, until some time in November, 1917, it maintained several watchmen on the property, together with an engineer and bookkeeper. During the period of active operations they were buying ore from various mines and converting the same into matte, which was disposed of, but I do not know whether they bought or sold any other personal property other than that they bought current supplies, lumber and other material for construction.

(e) I know of nothing in regard to any personal property which came into their possession, other than I stated in answer to "d".

(f) This question has been covered by "d" and "e", except that any property that came into the possession of said corporation was held or used at the smelter near Mayer, and the matte resulting from their smelting operations was shipped East to Chrome, New Jersey.

(g) The Great Western Smelters Corporation was an active, going concern for several months during 1917, as stated above, and did buy, use and sell personal property in the open market, as stated in answer to questions "d", "e" and "f" above.

In answer to Cross-Interrogatory III, he says:

(a) I believe that the mortgage filed with the

Equitable Trust Company of New York, as trustee, was a blanket mortgage covering the real estate, machinery and tools belonging to said smelter and any additions thereto. I do not know whether the terms of said mortgage were broad enough to cover any of the supplies or materials purchased by said company and not put into the building as a part thereof, or would cover any ores bought. The mortgage is in writing and is a trust deed given to the Equitable Trust Company of New York, as trustee.

(b) I do not have available a copy of said trust deed, which is very lengthy, but the same is of record in the Recorder's office of Yavapai County, State of Arizona.

(c) No answer thereto.

(d) I do not wish to be understood as stating that the Great Western Smelters Corporation never, at any time between February 2, 1917, and November 1, 1917, owned or had in its possession any personal property whatever which was not subject to a mortgage, lien or other encumbrance, as I do not positively know concerning this point.

(e) Answered by "d" above.

For answer to Cross-Interrogatory IV, he says:

(a) I know that the Great Western Smelters Corporation had money on deposit in the Mayer State Bank, in Mayer, Arizona, during the period between February 2, 1917, and November 1, 1917, because the corporation

issued check on said bank and they were always paid.

(b) I do not know each and all of the sums of money which Great Western Smelters Corporation collected, received or had in its possession during the period between February 2, 1917, and November 1, 1917, but I do know that John Borg loaned large sums of money, the exact amount of which I am unable to say.

(c) As I was not connected with the company, I cannot answer this question as I do not know what amounts were received or what amounts were disposed of or for what purpose, or the dates on which they were disposed of.

(d) Covered by my answer in "b" and "c" above.

For answer to Cross-Interrogatory V, he says:

(a) I do not know the details of any shipments received, but I do know that the shipments came in over the Santa Fe Railroad to Mayer; that is the only railroad coming in there, and that the corporation kept a bond at the railroad and that all freight was received under that bond.

(b) As stated above, I was not connected in any way with the Great Western Smelters Corporation, and therefore am unable to answer this question.

(c) I was not connected with the Great Western Smelters Corporation, and therefore I am unable to give any information as to the various shipments received, but as stated above the corporation kept a bond for the freight with the Railroad Company at Mayer, and to

the best of my knowledge all such charges were paid and the bond ultimately discharged.

For answer to Cross-Interrogatory VI, he says:

(a) The Great Western Smelters Corporation did the greater part of its business with the Mayer State Bank, Mayer, Arizona, and also did some business with the Bank of Arizona at Prescott, and the Prescott State Bank, Prescott, Arizona, during the year 1917.

(b) As I was not in any way connected with the Great Western Smelters Corporation, I am unable to answer this question.

The defendant moved to exclude the following answers of this witness, being sub-division "I" of his answer to Interrogatory Two, "Its business was not successful—it was a failure," upon the following grounds:

1. That the same was illegal, incompetent, irrelevant and immaterial to any issue in this cause.

2. The same is the expression of the opinion or conclusion of the witness.

The defendant moved to exclude the following answer of this witness, being sub-division "K" of his answer to Interrogatory Two, "The property was sold at an involuntary sale during the month of November, 1920," upon the following grounds:

1. The same was illegal, incompetent, irrelevant and immaterial to any issue in this cause.

2. The same is hearsay or secondary evidence.

The defendant moved to exclude the following answer of this witness, being sub-division "M" of his answer to Interrogatory Two, "The consideration paid at the Sheriff's Sale was approximately One Hundred and Fifty Thousand (\$150,000.00) Dollars, which was one-half of Three Hundred Thousand (\$300,000.00) Dollars bond issue which had been foreclosed, and led to the Sheriff's Sale," upon the following grounds:

1. The same was illegal, incompetent, irrelevant and immaterial to any issue in this cause.
2. The same is hearsay or secondary evidence.

The defendant moved to exclude the following answer of this witness, the same being sub-division (b) of his answer to Interrogatory IV, "In my opinion the greatest value of this property at any time between January 1st, 1917, and the time it was sold, would have been about Thirty-five Thousand Dollars (\$35,000.00), if the plant had been sold during the war period," upon the following ground:

1. The same was illegal, incompetent, irrelevant and immaterial to any issue in this cause.

The defendant moved to exclude the following answer of this witness, the same being sub-division (c) of his answer to Interrogatory IV, "It has been sold, and the answer to "b" above covers this point," upon the ground that the same is illegal, incompetent, irrelevant and immaterial to any issue in this cause.

The defendant moved to exclude the following

answer of this witness, the same being sub-division (a) of his answer to Interrogatory V, "Mr. John Borg, of New York City, had a duly recorded mortgage for all the property of Great Western Smelters Corporation," upon the following grounds:

1. The same was illegal, incompetent, irrelevant and immaterial to any issue in this cause.
2. The same is hearsay or secondary evidence.
3. The same is a statement of the substance or effect of a written instrument shown, or supposed to exist, and the absence of said written instrument has not been fully accounted for.

The defendant moved to exclude the answer of this witness, being sub-division (b) of his answer to Interrogatory V, "I do not know when the mortgage was placed on the property," upon the ground that the same was illegal, incompetent, irrelevant and immaterial to any issue in this cause.

The defendant moved to exclude the following answer of this witness, being sub-division (c) of his answer to Interrogatory V, "My understanding is that the amount of the debt secured by the Bort mortgage was Three Hundred Thousand Dollars (\$300,000.00)," upon the following grounds:

1. The same was illegal, incompetent, irrelevant and immaterial to any issue in this cause.
2. The same was hearsay or secondary evidence.
3. The same is the statement of the circumstances

or effect, or of the witness' understanding of the circumstances, or effect, of a written instrument shown or supposed to exist, the absence of which has not been sufficiently accounted for.

The defendant moved to exclude the following answer of this witness, being sub-division (d) of his answer to Interrogatory V, "There was another lien on the property of said corporation; it was a chattel mortgage on the machine tools of the machine shop. It was in the neighborhood of Sixteen Hundred Dollars (\$1600.00), I have forgotten the exact figures," upon the following grounds:

1. The same is illegal, incompetent, irrelevant and immaterial to any issue in this cause.
2. The same is hearsay or secondary evidence.
3. The same is the statement of the circumstances or effect of a written instrument shown or supposed to exist, the absence of which has not been sufficiently accounted for.

The defendant moved to exclude the following answer of this witness, being sub-division (e) of his answer to Interrogatory V, "In my opinion, the value of the property of the corporation did not equal the amount of the mortgage and lien debts on said property, and I believe that the debts were largely in excess of the value of the property," upon the following grounds:

1. The same is illegal, incompetent, irrelevant and immaterial to any issue in this cause.

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2. The same is hearsay or secondary evidence.

3. The same involves or includes a statement by the witness of the contents, or of his construction or interpretations of the contents of a written instrument shown or supposed to exist, the absence of which has not been sufficiently accounted for.

4. The same involves a comparison by the witness between two amounts or sums, shown or supposed to exist, neither of which is stated, and his opinion of the relation or proportion between the two.

The defendant moved to exclude the following answer of this witness, being sub-division (g) of his answer to Interrogatory V, "The Smelter located near Mayer was sold under the John Borg mortgage under foreclosure of bonds held by Mr. Borg, which amounted to Three Hundred Thousand Dollars (\$300,000.00). It was sold at public sheriff's sale in the month of November, 1920, about the 23rd day of said month, and the bid made was about one-half of said bonds, to-wit, about One Hundred and Fifty Thousand Dollars (\$150,000.00)," upon the following grounds:

1. The same is illegal, incompetent, irrelevant and immaterial to any issue in this cause.

2. The same is hearsay or secondary evidence.

3. The same is the statement in part of the contents of a written instrument shown or supposed to exist, the absence of which has not been sufficiently accounted for.

The defendant moved to exclude the following

answer of this witness, being sub-division (h) of his answer to Interrogatory V, "The bid was for approximately one-half of the mortgage indebtedness," upon the following grounds:

1. The same is illegal, incompetent, irrelevant and immaterial to any issue in this cause.
2. The same is hearsay or secondary evidence.
3. The same involves the statement in part of the contents of a written instrument shown or supposed to exist, the absence of which has not been sufficiently accounted for.
4. The same involves a comparison between two sums or amounts shown, or supposed to have existed, but neither of which is stated therein.

The defendant moved to exclude the following statement of this witness, the same being a portion of sub-division (b) of his answer to cross-interrogatory One, "Later, after Mr. Borg had purchased the smelter under his foreclosure, I purchased it from him and sold it to a third party, and therefore knew about the various mortgages and liens," upon the following grounds:

1. The same is illegal, incompetent, irrelevant and immaterial to any issue in this cause.
2. The same is not responsive to the question in reply to which it was made.
3. The same is hearsay or secondary evidence.

The defendant moved to exclude the following state-

ment of this witness, the same being a portion of sub-division (c) to his answer to cross-interrogatory One, "In 1917 I represented Eastern clients, and I searched the records of Yavapai County," upon the following grounds:

1. The same is illegal, incompetent, irrelevant and immaterial to any issue in this cause.

2. The same is hearsay or secondary evidence.

The defendant moved to exclude the following statement of this witness, the same being sub-division (d) of his answer to cross-interrogatory One, "This is covered in answer to "c", upon the following grounds:

1. The same is illegal, incompetent, irrelevant and immaterial to any issue in this cause.

2. The same is not the statement of any fact.

3. The same is merely a reference to another statement not included therein.

The defendant moved to exclude the following statement of this witness, the same being a portion of sub-division (c) of his answer to cross-interrogatory Two, "Which was covered by chattel mortgage above referred to," upon the following grounds:

1. The same is illegal, incompetent, irrelevant and immaterial to any issue in this cause.

2. The same is hearsay or secondary evidence.

3. The same is the statement of the contents or circumstances of a written instrument shown or supposed

to exist, the absence of which has not been accounted for.

4. The same is an expression of the opinion or conclusion of the witness, of the legal effect of a written instrument shown or supposed to exist, the absence of which has not been sufficiently accounted for.

The defendant moved to exclude the following statement of this witness, the same being a portion of subdivision (a) of his answer to cross-interrogatory Three, "I believe that the mortgage filed with the Equitable Trust Company of New York, as trustee, was a blanket mortgage covering the real estate, machinery, and tools belonging to said Smelter, and any additions thereto," upon the following grounds:

1. The same is illegal, incompetent, irrelevant and immaterial to any issue in this cause.

2. The same is not responsive to the question in reply to which it is made.

3. The same is hearsay or secondary evidence.

4. The same is a statement of the witness' belief as to the circumstances or effect of a written instrument shown or supposed to exist, the absence of which is not sufficiently accounted for.

The defendant moved to exclude each and every statement of this witness in reference to the existence, execution, contents, substance or effect of the written trust deed or lien referred to by him in his testimony, in answer to both direct and cross-interrogatories, upon the following grounds:

1. The same is illegal, incompetent, irrelevant and immaterial to any issue in this cause.

2. The same is hearsay or secondary evidence.

3. The same is not the best evidence of the facts sought to be established.

4. The same is a verbal statement of the contents, circumstances or effect of the terms of a written instrument shown to exist, the absence of which has not been sufficiently accounted for.

5. The same is not the best evidence, but is secondary evidence of the contents, or circumstances of a written instrument, and no sufficient predicate has been laid for the introduction of said secondary evidence.

The plaintiff then rested.

The defendant then introduced as a witness in its behalf H. M. Brooks, who testified that he was and is a member of the firm of Tutwiler & Brooks, being the same firm of Tutwiler & Brooks as that mentioned in the bills of lading introduced in evidence by the plaintiff; that the said firm of Tutwiler & Brooks was engaged in business in the City of Birmingham, Alabama, prior to, and on the 7th day of January, 1917, and has been so engaged ever since that time up to and including the present time; that shortly before the said 7th day of January, 1917, the said firm of Tutwiler & Brooks purchased from the defendant, Central Iron & Coal Company, the coke shown by several bills of lading introduced in evidence by the plaintiff, and being all of the

coke referred to in the complaint in this cause, at a stipulated price per ton at Holt, Alabama; that said Tutwiler & Brooks paid said Central Iron & Coal Company the agreed purchase price for said coke and sold the same to Great Western Smelters Corporation of Mayer, Arizona, at a stipulated price per ton at Holt, Alabama, and instructed said Central Iron & Coal Company to ship said coke to Mayer, Arizona, consigned to Order of Tutwiler & Brooks, Notify Great Western Smelters Corporation at Mayer, Arizona; that under and in pursuance of said instructions, said Central Iron & Coal Company delivered said coke to the plaintiff at Holt, Alabama, and received from the plaintiff for the same the bills of lading introduced in evidence by the plaintiff; that Tutwiler & Brooks thereupon forwarded said bills of lading to a bank at Mayer, Arizona, with a draft drawn by said Tutwiler & Brooks on said Great Western Smelters Corporation for the price at which Tutwiler & Brooks had sold said coke to Great Western Smelters Corporation, with instructions to the bank to deliver said bills of lading to said Great Western Smelters Corporation upon payment by the latter of the said draft; that the said bank presented said draft to the Great Western Smelters Corporation, and said Great Western Smelters Corporation paid to said bank the amount of said draft; and said bank thereupon delivered to said Great Western Smelters Corporation the said bills of lading, and remitted to said Tutwiler & Brooks the money so paid by Great Western Smelters Corporation.

The defendant introduced in evidence the deposition of Charles Batre, of Mayer, Arizona, whose deposition

was taken on behalf of the defendant, which deposition and the direct and cross interrogatories and defendant's objections to the cross interrogatories are as follows:

Now comes Central Iron & Coal Company, defendant in the above stated cause, and filed and propounds the following interrogatories to Charles Batre, a material witness for the defendant in said cause.

Said Charles Batre resides in the City of Boston, in the State of Massachusetts, and his address is Number 262, Washington Street, Boston, Massachusetts.

Interrogatory I.

(a) What is your name, age, and place of residence?

(b) Did you ever reside at Mayer, in the State of Arizona? If so, during what period?

(c) Were you ever interested in and connected in business with Great Western Smelters Corporation, a corporation, which was formerly engaged in business at Mayer, Arizona?

(d) If so, please state the period during which you were so interested in and connected with said Great Western Smelters Corporation?

(e) Please state what position or office, if any, you occupied in or with said Great Western Smelters Corporation, and what your duties were?

(f) Please state when said Great Western Smelters Corporation began business, and when it discontinued

business, stating the entire period during which it was engaged in business?

Interrogatory II.

(a) If you have stated in answer to any of the foregoing interrogatories that you were interested in and connected with said Great Western Smelters Corporation, please state whether you were so connected with said corporation during the month of February, 1917, when ten car loads of coke purchased by Great Western Smelters Corporation from Tutwiler & Brooks of Birmingham, Alabama, were delivered to said Great Western Smelters Corporation at Mayer, Arizona?

(b) Did, or did not, the Great Western Smelters Corporation pay the draft, or drafts, which were drawn on it by Tutwiler & Brooks for the purchase price of said coke?

(c) Did, or did not, said Great Western Smelters Corporation, upon the payment of said draft or drafts, receive from the bank or banks, through which said draft or drafts were drawn, the bills of lading for said coke?

(d) Did or did not, said Great Western Smelters Corporation surrender to Atchinson, Topeka & Santa Fe Railroad Company's agent at Mayer, Arizona, said bills of lading for said coke?

(e) Did, or did not, said agent of said Atchinson, Topeka & Santa Fe Railroad Company at Mayer, Arizona, upon receipt from Great Western Smelters Corporation of said bills of lading, render to said Great

Western Smelters Corporation a bill for the freight or carrying charges on said coke, and require that the amount so rendered as the freight or carrying charges on said coke be paid to said Great Western Smelters Corporation?

(f) Did, or did not, said Great Western Smelters Corporation, before receiving said coke, pay to the Atchinson, Topeka & Santa Fe Railroad Company's agent at Mayer, Arizona, the full amount claimed and demanded by the latter as the freight or carrying charges on said coke?

(g) Did Atchinson, Topeka & Santa Fe Railroad Company, or its agent at the time of delivering said coke to said Great Western Smelters Corporation, demand of the latter, as freight or carrying charges on said coke, any sum other than that which was paid by the Great Western Smelters Corporation to the Railroad Company?

(h) Had, or had not, Great Western Smelters Corporation, at the time said coke was delivered, the means with which to pay Three Thousand Four Hundred Sixty-three & 46/100 Dollars (\$3,463.46), in addition to the amount which it paid as freight on said coke, if it had been shown that said additional sum of Three Thousand Four Hundred Sixty-three & 46/100 Dollars (\$3,463.46) was due and that Great Western Smelters Corporation was liable for it?

(i) Did, or did not, Great Western Smelters Corporation, at that time, own property, free from incum-

brance, of the value of Three Thousand Four Hundred Sixty-three & 46/100 Dollars (\$3,463.46)?

(j) Has said Atchinson, Topeka & Santa Fe Railroad Company or the Louisville & Nashville Railroad Company, or any other railroad company, or the agent of any such company, since the delivery of said coke to the Great Western Smelters Corporation ever demanded of the latter any other further or additional sum of money as freight or carrying charges on said coke, other than that which was paid at the time said bills of lading were surrendered and said coke was delivered?

(k) Has said Atchinson, Topeka & Santa Fe Railroad Company or Louisville & Nashville Railroad Company, or any other railroad company, since said bills of lading were surrendered and said coke delivered in February, 1917, ever presented to the Great Western Smelters Corporation a bill for Three Thousand Four Hundred Sixty-three & 46/100 Dollars (\$3,463.46) claimed by such railroad company to be still due as a balance on the freight or carrying charges on said coke in addition to the amount which was paid when said coke was delivered?

(l) If so, when, by whom and to whom was such presentment made?

(m) Has said Atchinson, Topeka & Santa Fe Railroad Company or Louisville & Nashville Railroad Company, or any other railroad company, since said coke was delivered, ever brought suit against Great Western Smelters Corporation for, or demanded of it, the pay-

ment of, or ever presented to it a bill for Three Thousand Four Hundred Sixty-three & 46/100 Dollars (\$3,463.46), or for any other amount, as balance due as freight, or carrying charges on said coke?

(n) If so, when and by whom was such suit brought or such presentation made?

Interrogatory III.

(a) What use or disposition did Great Western Smelters Corporation make of the ten carloads of coke purchased by it from Tutwiler & Brooks of Birmingham, Alabama, in the month of January, 1917, and delivered by Atchinson, Topeka & Santa Fe Railroad Company to Great Western Smelters Corporation at Mayer, Arizona, during the month of February, 1917?

(b) Did said Great Western Corporation sell said coke to some other person, firm, or corporation, or did it use the same in the operation of its own plant?

(c) If you have stated that Great Western Smelters Corporation used said coke in the operation of its own plant, please state where said plant was then located with reference to Atchinson, Topeka & Santa Fe Railroad Company's station at Mayer, Arizona, that is to say, please state the distance from the Atchinson, Topeka & Santa Fe Railroad Company's station at Mayer, Arizona to Great Western Smelters Corporation's plant at Mayer, Arizona.

(d) How long was it after Great Western Smelters Corporation received said coke before it had consumed

the whole of it? That is to say, for what length of time did the Great Western Smelters Corporation have all, or any part, of said coke in its possession?

(e) Assuming said coke to have been delivered to Great Western Smelters Corporation during the month of February, 1917, please state how long after that the Great Western Smelters Corporation continued to be actively engaged in business in Mayer, Arizona? That is to say, on what date did Great Western Smelters Corporation discontinue business?

(f) Please state as fully as you can, all of the properties which Great Western Smelters Corporation had in its possession, or all which passed through its hands, at Mayer, Arizona, between the month of February, 1917, and the month of April, 1920, stating approximately the total value of all of said property?

(g) Did, or did not, Great Western Smelters Corporation have any money on deposit to its credit in any bank or banks at Mayer, Arizona, or elsewhere, during the month of February, 1917, and from that time until the month of April, 1920? If so, please state as nearly as you can, the total amount which said Company had on deposit at bank to its credit during the period mentioned?

(h) Was there any mortgage, deed of trust, or other lien on any of the personal property which you have mentioned as having belonged to Great Western Smelters Corporation, or on any of the money which you have stated it had on deposit at bank during the period mentioned?

(i) What disposition did Great Western Smelters Corporation make of the personal property which you have mentioned as having been owned and possessed by it during the period extending from the month of February, 1917, to the month of April, 1920? What disposition did Great Western Smelters Corporation make of the money which you have mentioned as having been on deposit to its credit in bank during the month of February, 1917, and from that time until the month of April, 1920?

Interrogatory IV.

(a) Were any other shipments of any kind of freight, goods, or material, made to the Great Western Smelters Corporation by or over Atchinson, Topeka & Santa Fe Railroad after the date on which this coke above referred to was delivered?

(d) Did Atchinson, Topeka & Santa Fe Railroad Company, after the delivery of this coke, ever have in its possession any freight goods, or material consigned to and belonging to Great Western Smelters Corporation?

(c) Did Atchinson, Topeka & Santa Fe Railroad Company, after the delivery of the coke hereinabove mentioned, ever deliver to Great Western Smelters Corporation any freight, goods or material which had been shipped over Atchinson, Topeka & Santa Fe Railroad, and consigned to Great Western Smelters Corporation at Mayer, Arizona?

(d) Did Atchinson, Topeka & Santa Fe Railroad

Company ever have in its possession at Mayer, Arizona, any freight, goods or material belonging to Great Western Smelters Corporation which had been shipped and consigned to the latter over Atchinson, Topeka & Santa Fe Railroad, or over that and another railroad, or other railroads?

(e) If so, please state on how many different and separate occasions freight was shipped to said Great Western Smelters Corporation and delivered to it by Atchinson, Topeka & Santa Fe Railroad Company at Mayer, Arizona?

(f) Did Atchinson, Topeka & Santa Fe Railroad Company ever hold, or attempt to hold any of this freight, goods or material for the collection or payment of any balance which it alleged to be due on the ten carloads of coke above mentioned?

(g) Did Atchinson, Topeka & Santa Fe Railroad Company ever refuse to deliver to Great Western Smelters Corporation any of the freight, goods or material which it had in its possession belonging to Great Western Smelters Corporation after this coke was delivered, unless or until Great Western Smelters Corporation paid an amount alleged to be due as balance of freight or carrying charges on said coke?

Interrogatory V.

(a) Was there a mortgage or deed of trust on Great Western Smelters Corporation's plant at Mayer, Arizona, during the year 1917?

(b) If you say that there was a mortgage or deed of trust on its plant, please state whether this said mortgage or deed of trust covered its personal property and materials which said Great Western Smelters Corporation owned or handled during the year 1917, or thereafter?

(c) Did said mortgage or deed of trust cover or include the money which Great Western Smelters Corporation had on deposit to its credit in bank during the year 1917 or thereafter?

Interrogatory VI.

(a) Was said Great Western Smelters Corporation's plant sold under mortgage or deed of trust?

(b) If so, please state the date on which said sale was made?

(c) Please state the date on which Great Western Smelters Corporation first made default in the payment of any of its past due indebtedness, either principal or interest, which was secured by the mortgage or deed of trust on its plant?

(d) If you have stated the date on which Great Western Smelters Corporation made default in payment of the interest or principal upon the debt secured by said mortgage or deed of trust, please state whether or not said Great Western Smelters Corporation was in default in either particular prior to the date you have mentioned?

(e) Please state whether or not Great Western

Smelters Corporation had paid all of its current debts and bills promptly up to the date on which you have stated it made default in the payment of the interest or principal of the indebtedness secured by the mortgage or deed of trust on its plant?

Interrogatory VII.

(a) During the month of February, 1917, and from that time until the month of April, 1920, was Great Western Smelters Corporation able to pay, and if it had declined to pay, could it have been forced to pay an indebtedness of Three Thousand Four Hundred Sixty-three and 46/100 Dollars (\$3,463.46), if it had been shown to be liable therefor, or to have owed the same?

(b) During the period mentioned could the sum of Three Thousand Four Hundred Sixty-three and 46/100 Dollars (\$3,463.46) have been collected from said Great Western Smelters Corporation upon execution?

Interrogatory VIII.

(a) Did, or did not, Great Western Smelters Corporation have any money on deposit with Atchinson, Topeka & Santa Fe Railroad Company during the month of February, 1917?

(b) If so, what was the amount of said money, when was it deposited with Atchinson, Topeka & Santa Fe Railroad Company, and for what purpose, or on what terms was it so deposited?

(c) If you have stated that Atchinson, Topeka &

Santa Fe Railroad Company had in its hands during the month of February, 1917, a sum of money belonging to Great Western Smelters Corporation, please state what disposition was finally made of this money, and when it was so disposed of?

The plaintiff propounded to the said witness, Charles Batre, the following cross-interrogatories:

Cross-Interrogatory I.

(a) Do you know when the alleged undercharge in freight on the ten cars of coke was discovered? If so, state when it was discovered.

(b) When was the undercharge first called to the attention of the Great Western Smelters Corporation or any of its officers or agents?

Cross-Interrogatory II.

(a) When did the Great Western Smelters Corporation discontinue operation of its plant at or near Mayer, Arizona?

(b) When it discontinued operation what disposition did it make of its property at Mayer?

(c) Did it leave any officer or agent at Mayer after it discontinued operation who had authority to pay any claims against the company, or to transact any business for the company? If so, give the name and present address of such officer or agent.

(d) After it discontinued business, did the Great

Western Smelters Corporation have any other property at Mayer except its lands, buildings, machinery and plant generally?

(e) Were not the real estate and machinery and plant under mortgage at that time for as much or more than it was worth?

Cross-Interrogatory III.

(a) If you have said that the property of the Great Western Smelters Corporation which remained at Mayer after it discontinued business was under a mortgage, or deed of trust, or vendor's lien, one or both, state the amounts of such mortgage or liens, the names and present address of the holders of said mortgage or liens, and when said mortgage or liens were foreclosed.

(b) If you have stated that the mortgages or liens were foreclosed and the property sold thereunder, state what the property brought at such foreclosure or sale.

(c) If you have said the properties were not sold under said mortgages or liens, state what disposition was made of them and when they were disposed of.

Cross-Interrogatory V.

(a) Do you know whether or not the Great Western Smelters Corporation had at Mayer, Arizona, at the time the alleged undercharge in freight was discovered, any property other than that which was covered by mortgages or other liens.

(b) Is the Great Western Smelters Corporation

now in existence as a corporation, or has it been dissolved? If you state that it has been dissolved, when was it dissolved?

(c) If you state that the Great Western Smelters Corporation still exists as a corporation, state whether or not it is solvent or insolvent, and if insolvent, when it became insolvent.

(d) Could the Atchinson, Topeka & Santa Fe Railroad Company have collected the alleged undercharge out of the property of the Great Western Smelters Corporation at Mayer, Arizona, at the time the alleged undercharge was discovered? Was the property of the Great Western Smelters Corporation at Mayer, Arizona, at that time of sufficient value, over and above the mortgage and other lien indebtedness, to have enabled the Atchinson, Topeka & Santa Fe Railroad Company to have collected a judgment out of said property?

Now comes Central Iron & Coal Company, defendant in the above stated cause and makes and filed the following objections to the cross-interrogatories propounded by the Louisville & Nashville Railroad Company, plaintiff in the above stated cause to the witness Charles Batre:

The defendant objects to sub-division (a) of cross-interrogatory One, upon the following grounds:

1. The same is illegal, incompetent, irrelevant and immaterial.

2. The same calls for testimony which would be

illegal, incompetent, irrelevant and immaterial to any issue in this cause.

3. It is immaterial to any issue in this cause when the said alleged undercharge in freight on said coke was discovered.

4. It does not appear by whom the supposed discovery of said undercharge was made.

5. Said interrogatory does not state, show, and indicate the person by whom said supposed discovery of undercharge of said freight was made.

6. If said supposed undercharge in the freight on said coke exists now, or ever has existed, it existed at the time said coke was delivered to the consignee and collection was made of a portion of the freight due thereon, and the amount of the freight due on said coke should have been known to the delivering carrier before, or at the time, said coke was delivered to the consignee, and if it was not known, that fact cannot affect the rights or liabilities of the parties to this suit.

The defendant objects to sub-division (b) of cross-interrogatory One, on each and all of the grounds assigned in support of its objection to sub-division (a) of cross-interrogatory One, and numbered 1, 2, 3, 4, 5 and 6 respectively, each of said grounds of objection being assigned separately and severally.

The defendant objects to sub-division (a) of cross-interrogatory Five upon each of the grounds assigned in support of the objection to sub-division (a) of cross-

interrogatory One, and numbered 1, 2, 3, 4, 5 and 6 respectively, each of said grounds of objection assigned separately and severally.

The defendant objects to the following portion of sub-division (d) of cross-interrogatory Five, "Could the Atchinson, Topeka & Santa Fe Railroad Company have collected the alleged undercharge out of the property of the Great Western Smelters Corporation at Mayer, Arizona, at the time the alleged undercharge was discovered," upon each and all of the grounds assigned in support of objections to sub-division (a) of cross-interrogatory One, and numbered 1, 2, 3, 4, 5 and 6 respectively, each of said grounds of objection assigned separately and severally.

The defendant objects to the following portion of sub-division (d) of cross-interrogatory Five, "Was the property of the Great Western Smelters Corporation at Mayer, Arizona, at that time of sufficient value, over and above the mortgage and other lien indebtedness, to have enabled the Atchinson, Topeka & Santa Fe Railroad Company to have collected a judgment out of said property?" upon each and all of the grounds of objection assigned in support of the last preceding objection to a portion of said sub-division (b) of cross-interrogatory Five and numbered 1, 2, 3, 4, 5 and 6 respectively, each of said grounds of objection being assigned separately and severally.

The defendant objects to the whole of sub-division (d) of cross-interrogatory Five upon each and all of the grounds assigned to the last preceding and next to the

last preceding objection to the above stated portions of sub-division (d) of cross-interrogatory Five, and numbered 1, 2 3, 4, 5 and 6 respectively, each of said grounds of objection being assigned separately and severally.

The defendant objects to sub-division (a) of cross-interrogatory Two, upon the following grounds:

1. The same is illegal, incompetent, irrelevant and immaterial.

2. The same calls for evidence which would be illegal, incompetent, irrelevant and immaterial to any issue in this cause.

3. It does not appear that Great Western Smelters Corporation had discontinued operation of its plant at or near Mayer, Arizona, before or at the time said coke was delivered to it, and the freight thereon should have been collected.

4. It does not appear that Great Western Smelters Corporation had discontinued operation of its plant at or near Mayer, Arizona, before or at the time said coke was delivered to it, and the freight thereon should have been collected; and this being true, it is immaterial how soon it discontinued operation of its plant after the delivery of said coke.

5. The time for the collection of the freight on said coke was the time the shipment of the same was delivered to Great Western Smelters Corporation.

The defendant objects to sub-division (b) of cross-interrogatory Two, upon the following grounds:

1. The same is illegal, incompetent, irrelevant and immaterial.

2. The same calls for evidence which would be illegal, incompetent, irrelevant and immaterial to any issue in this cause.

3. It is immaterial when Great Western Smelters Corporation discontinued business or what its financial condition was after the delivering carrier delivered to it the coke in question.

4. The only date at which the financial condition of the Great Western Smelters Corporation is material in this cause, is that at which Atchinson, Topeka & Santa Fe Railroad Company delivered said coke to it and collected from it a part of the freight on said coke.

The defendant objects to sub-division (c) of cross-interrogatory Two upon each and all of the grounds assigned in support of objection to sub-division (b) of cross-interrogatory Two, and numbered 1, 2, 3 and 4 respectively, each of said grounds of objection being assigned separately and severally.

The defendant objects to sub-division (d) of cross-interrogatory Two upon each and all of the grounds assigned in support of objection to sub-division (b) of cross-interrogatory Two and numbered 1, 2, 3 and 4 respectively, each of said grounds of objection being assigned separately and severally.

The defendant objects to sub-division (e) of cross-interrogatory Two upon each and all of the grounds

assigned in support of objection to sub-division (b) of cross-interrogatory Two and numbered 1, 2, 3 and 4 respectively, each of said grounds of objection being assigned separately and severally.

The defendant objects to cross-interrogatory Three upon each and all of the grounds assigned in support of objection to sub-division (b) of cross-interrogatory Two and numbered 1, 2, 3 and 4 respectively, each of said grounds of objection being assigned separately and severally.

The defendant objects to sub-division (a) of cross-interrogatory Four upon each and all of the grounds assigned in support of objection to sub-division (b) of cross-interrogatory Two and numbered 1, 2, 3 and 4 respectively, each of said grounds of objection being assigned separately and severally.

The defendant objects to sub-division (b) of cross-interrogatory Four upon each and all of the grounds assigned in support of objection to sub-division (b) of cross-interrogatory Two and numbered 1, 2, 3 and 4 respectively, each of said grounds of objection being assigned separately and severally.

The defendant objects to sub-division (c) of cross-interrogatory Four upon each and all of the grounds assigned in support of objection to sub-division (b) of cross-interrogatory Two and numbered 1, 2, 3 and 4 respectively, each of said grounds of objection being assigned separately and severally.

The defendant objects to sub-division (b) of cross-

interrogatory Five upon each and all of the grounds assigned in support of objection to sub-division (b) of cross-interrogatory Two and numbered 1, 2, 3 and 4 respectively, each of said grounds of objection being assigned separately and severally.

The defendant objects to sub-division (c) of cross-interrogatory Five upon each and all of the grounds assigned in support of objection to sub-division (b) of cross-interrogatory Two and numbered 1, 2, 3 and 4 respectively, each of said grounds of objection being assigned separately and severally.

Deposition of Charles Batre

For answer to Interrogatory One, he says:

My name is Charles Batre; I am 58 years of age. My residence is Mayer, Arizona.

(b) I resided in Mayer, Arizona for several months, and have called Mayer my residence since 1916.

(c) I incorporated the Great Western Smelters Corporation in October, 1916, under the laws of the State of Delaware.

(d) I was interested in and connected with the Great Western Smelters Corporation from the date of the incorporation in 1916, until May, 1919, when I sold all of my interests in the company.

(e) I occupied the position of active Vice-President of the Company, and financed it.

(f) This company began business when it was in-

corporated; I think in October, 1916. I was actively engaged in the management of the business until May, 1919, and personally paid the taxes and interest on the bonded indebtedness including April 15, 1920.

For answer to Interrogatory Two, he says:

(a) I was connected with the said Great Western Smelters Corporation during the month of February, 1917, when ten carloads of coke were received by the company from Tutwiler & Brooks of Birmingham, Alabama, and delivered at Mayer, Arizona.

(b) The great Western Smelters Corporation paid the draft drawn by Tutwiler & Brooks for the purchase price of said coke, upon presentation.

(c) Upon payment of the draft for the purchase price of this coke, the company received the bill of lading from the bank through which the draft was drawn.

(d) The bills of lading for this coke were then surrendered to the agent of the Atchinson, Topeka & Santa Fe Railway Company at Mayer, Arizona.

(e) Upon delivery of this bill of lading the agent of the railroad company rendered to the company a bill for freight on this coke and required the same to be paid by the smelter company.

(f) The full amount claimed by the railroad company for freight on this shipment of coke was paid by the smelter company. In this country, a rule of the Santa Fe Railroad Company provided, and did provide at the date when this coke arrived, that we would keep

a cash deposit with the agent at Mayer of not less than five thousand dollars at all times, to cover freight charges as cars would arrive, and at any time we did not have this cash deposit up to five thousand dollars, the Superintendent of the smelter was notified, and the deposit made good. When the railroad company refused to give us a guarantee that this five thousand dollars would be guaranteed safe to us, it was then changed to a bond for all freight bills up to five thousand dollars, on a form used by the Santa Fe Railroad Company, and approved by them. Then, whenever cars would arrive, we would send up a check in payment, and consequently we always had money to our credit, and never owed Santa Fe anything, but they always owed us. This was the situation exactly. Very likely, when this coke arrived it was before the bond had been made, and the cars were sent down to the smelter and unloaded as we had a cash deposit of five thousand dollars with the railroad.

(g) The full amount claimed and demanded by the agent of the Atchinson, Topeka & Santa Fe Railway Company at the time of the delivery of the coke was paid, and no amount in addition to the amount paid was claimed by him.

(h) We had ample funds on hands to pay all bills, and could have paid as freight the sum of Three Thousand Four Hundred Sixty-three and 46/100 (\$3,463.46) Dollars in addition to the sum which was paid, if it had been shown that this further amount was due.

(i) The Great Western Smelters Corporation at

the time of the delivery of this coke owned property worth many times the sum of Three Thousand Four Hundred Sixty-three and 46/100 Dollars.

(j) There was never any demand made by any railroad company, or the agent of any railroad company since the delivery of this coke for any further sum of money as freight on this shipment, other than that which was paid at the time the bills of lading were surrendered and the coke delivered.

(k) We have never had presented by any railroad company, or the agent of any railroad company, a bill for \$3,463.46 as a balance due for freight on this shipment of coke, in addition to the amount paid for freight at the time of the delivery of the shipment.

(l) No presentment of any further bill was ever made.

(m) No railroad company has ever brought suit against the Great Western Smelters Corporation, or demanded of it payment of the sum of \$3,463.46 as a balance due for freight on this shipment of coke.

(n) No suit was ever filed, or demand made, for the payment of any further sum for freight on this shipment.

For answer to Interrogatory Three, he says:

(a) The ten carloads of coke purchased from Tutwiler & Brooks and delivered to the company at Mayer in February, 1917, was used by the smelter company in smelting copper ore.

(b) The Great Western Smelters Corporation never sold any of this coke to any person, firm or corporation, but it was all used in the operation of its plant.

(c) The Great Western Smelters Corporation Plant was on a branch track of its own about twelve hundred feet from the tracks of the Santa Fe Railway in an easterly direction, and about one-half mile from the station of the Santa Fe, at Mayer, Arizona.

(d) We commenced using this coke right away; it was the first coke that we bought. It probably lasted thirty days.

(e) We discontinued operations about the first of June, 1917.

(f) We paid out here in Mayer during the period above mentioned, about four hundred and twenty-five thousand dollars in actual cash.

(g) From the month of February, 1917, to the month of June, 1917, the smelter company kept in bank at Mayer, Arizona, from twenty thousand to seventy-five thousand dollars at all times; the average daily balance was about twenty thousand dollars.

(h) There was a first mortgage bond issue of two hundred and fifty thousand dollars against the plant. Nothing against the company's bank deposits.

(i) In 1918 or 1919 the smelter company was sold to the Big Ledge Copper Company. In April, 1920, the Big Ledge Copper Company defaulted on the interest on its bonds, and the property was foreclosed on by the

bondholders. The money was paid out for construction of a furnace, supplies, labor and equipment. We paid out a lot of it to Senator Clark for the purchase of a five hundred ton unit and power plant. We also installed and equipped and put in operation a two hundred ton unit, which, the day it was blown in was appraised by one of Allis-Chalmers' men of Chicago, as being worth one hundred and sixty thousand dollars. We paid him to come and make the appraisal for the bondholders.

For answer to Interrogatory Four, he says:

(a) Shipments of freight were made to the Great Western Smelters Corporation over the Atchinson, Topeka & Santa Fe Railway Company every day for months after the date that this coke was delivered.

(b) Every day something came for us over the Santa Fe. We kept this branch line up, outside of the Blue Bell Mine.

(c) The Santa Fe delivered to us every day car-load lots of stuff coming from Jerome, bringing over the five hundred ton unit and power plant from the United Verde Mine. They kept on coming, these shipments, even after we shut down; they kept up for months.

(d) The Atchinson, Topeka & Santa Fe Railway Company had in its possession at all times for months after the delivery of this coke other shipments which had been made to us.

(e) Freight was shipped to us and delivered by the Santa Fe to the Great Western Smelters Corporation, at Mayer, Arizona, every day for months after this

coke arrived. We were building a smoke stack, and stuff was coming in every day.

(f) The Atchinson, Topeka & Santa Fe Railway Company never held, nor attempted to hold any other freight consigned to us for collection or payment of any balance which it was alleged to be due on the ten earloads of coke above mentioned.

(g) The Santa Fe never did refuse to deliver to the Great Western Smelters Corporation any freight, or other material which it had in its possession belonging to this company after this coke was delivered until we paid any amount claimed to be due as a balance for freight charges on this coke.

For answer to Interrogatory Five, he says:

(a) There was a first mortgage on the plant of the Great Western Smelters Corporation, at Mayer, Arizona, in 1917, for the sum of two hundred and fifty thousand dollars.

(b) This mortgage did not cover any bank deposits.

For answer to Interrogatory Six, he says:

(a) The plant of the Great Western Smelters Corporation was foreclosed on by the bondholders. You see, one man held about all of the bonds.

(b) The date of sale under this foreclosure was, I think, in November, 1920.

(c) The Great Western Smelters Corporation had no indebtedness and did not make any default in the payment of any indebtedness; the Big Ledge Copper

Company defaulted on the interest on the bonds on April 15, 1920.

(d) The Great Western Smelters Corporation made no default in the payment of any principal or interest secured by the mortgage above mentioned.

(e) All current bills of every kind of the Great Western Smelters Corporation were paid. The only default was made by the Big Ledge Copper Company in the payment of the interest due on the bonds. My part was as clean as a whistle.

For answer to Interrogatory Seven, he says:

(a) During the month of April, 1917, and from that time until April 15, 1920, the Great Western Smelters Corporation was able to pay, and if it had declined to pay could have been forced to pay an indebtedness of \$3,463.46, if it had been shown to be liable therefor, or to have owed the same.

(b) During this same period the Great Western Smelters Corporation would have been good for an execution in the sum of \$3,463.46.

For answer to Interrogatory Eight, he says:

(a) The Great Western Smelters Corporation had on deposit with the Atchinson, Topeka & Santa Fe Railway Company during the month of February, 1917, the sum of five thousand dollars, at all times, to protect freight bills, so that cars would be sent down to the smelter so that we could open and unload them and there would be no delay in receiving shipments of supplies.

(b) We had on deposit with the railroad the sum of five thousand dollars, which was deposited at the time we began construction in advance of the arrival of freight, as they did not allow cars to be opened until the freight charges were paid. It was to guarantee the payment of freight charges, and they would be deducted from this deposit if not otherwise paid.

(c) The deposit in the hands of the Santa Fe was finally all used up in the payment of freight charges on shipments coming to the Great Western Smelters Corporation.

For answer to cross-interrogatory One, he says:

(a) The alleged undercharge for freight on the shipment of ten carloads of coke above mentioned, was first called to my attention only in June, 1921.

(b) The alleged undercharge above mentioned was first called to the attention of the Great Western Smelters Corporation, or any of its officers or agents, in June, 1921.

For answer to cross-interrogation Two, he says:

(a) The great Western Smelters Corporation discontinued operations of its plant at Mayer, Arizona in July, 1918.

(b) When operations were discontinued, the company paid all taxes, interest on its bonds, and retained the property in its possession and kept two watchmen.

(c) I was left at Mayer, Arizona, after the discontinuance of operations, and had authority to pay any

claims against the company, and transact any business for the company.

(d) The company had no property at Mayer, in addition to its plant and lands, except deposits in the bank at Mayer at all times for the payment of its bills.

(e) The real estate, machinery and plant of the company was not at that time under mortgage for more than they were worth.

For answer to cross-interrogatory Three, he says:

(a) The Great Western Smelters Corporation did not find its ores practically worthless, or of such a character that it could not successfully operate in the reduction of the ores, and did not then discontinue business and withdraw its officers and agents from Mayer, and leave nothing there but its mortgaged property.

For answer to cross-interrogatory Four, he says:

(a) The mortgage on the property was for two hundred and fifty thousand dollars, and there were issued six per cent, ten year bonds. The bondholders foreclosed in November, 1920, to the best of my recollection.

(b) I do not know what the property brought under such foreclosure sale. This could be ascertained by referring to the records at Prescott, Arizona.

(c) The mortgage on the property was foreclosed in November, 1920.

For answer to cross-interrogatory Five, he says:

(a) The Great Western Smelters Corporation had

at Mayer, Arizona, at the time of the alleged undercharge in freight was discovered no property other than that which was covered by mortgages on other liens.

(b) I do not know whether the company is still in existence or whether it has been dissolved, as I have not been an officer of the company for two years.

(c) I do not know whether the Great Western Smelters Corporation still exists, or whether it is at this time solvent or insolvent.

(d) At the time this undercharge was discovered by me, or brought to my attention, in June, 1921, this bill could not have been collected out of the property of the Great Western Smelters Corporation, at Mayer, Arizona, because the property had been foreclosed upon by the bondholders. The Atchinson, Topeka & Santa Fe Railway Company could not at that time have collected a judgment out of said property, because the property was out of the hands of the said corporation.

The defendant upon the introduction of the said deposition of Charles Batre moved to exclude the answers of said witness to all the cross interrogatories propounded to said witness, to which objection was made at or prior to the time of taking of his deposition.

The defendant then rested.

Upon the conclusion of the introduction of evidence the plaintiff requested of the Court, in writing, a charge as follows, to-wit:

"The Court charges the jury that if they believe all the evidence in this case they must find a verdict for the plaintiff;" which charge the Court refused, and wrote thereon the words "Refused, W. I. Grubb, Judge."

And to the refusal of said requested charge, the plaintiff then and there, in open court and before the jury had retired, and in the presence of the jury, duly and legally excepted.

The defendant then requested the Court, in writing, to give the following charge:

"I charge you gentlemen of the jury, that if you believe all the evidence in this case, you must find your verdict for the defendant;" which charge the Court gave and wrote thereon the words "Given, W. I. Grubb, Judge." To the ruling of the Court in giving the said charge on behalf of the defendant the plaintiff then and there, in open court, before the jury had retired, and in the presence of the jury, duly and legally excepted.

AND, NOW, in furtherance of justice, and that right may be done, the plaintiff tenders and presents the foregoing as its bill of exceptions in this cause to the action of the Court, and prays that the same may be settled and allowed, and signed and sealed by the Court and made a part of the record, and the same is accordingly done, during the time allowed by an order granted during the term at which said cause was tried, to-wit, on this the 6th day of December, 1921.

W. I. GRUBB,

Judge Presiding.

The within bill of exceptions was duly presented to me on the 6th day of December, 1921.

W. I. GRUBB,

District Judge.

This bill is correct in my judgment.

Jan. 26, 1922.

HENRY A. JONES.

STIPULATION OF COUNSEL

Filed February 4, 1922

CHAS. J. ALLISON, Clerk

IN THE UNITED STATES DISTRICT COURT, IN
AND FOR THE WESTERN DIVISION OF THE
NORTHERN DISTRICT OF ALABAMA.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY a Corporation, *Plaintiff*.

vs.

No. 111

CENTRAL IRON & COAL COMPANY,
a Corporation, *Defendant*.

Stipulation of Counsel for Plaintiff and Defendant.

In order to shorten the record to be sent up to the Circuit Court of Appeals for the Fifth Judicial Circuit on a writ of error, it is agreed by the attorneys for the Plaintiff and Defendant as follows:

1. Only one of the four bills of lading introduced, in evidence by the plaintiff shall be set out in extenso in the bill of exceptions, and in lieu of copies of the remaining three bills of lading the following statement shall be inserted in the bill of exceptions: "In addition to the bill of lading, a copy of which is set out immediately hereinabove, the plaintiff introduced three other bills of lading, identical with that a copy of which is hereinabove

set out in all particulars except as to the numbers of the cars and the weights of the coke in the several cars. The aggregate weight of the coke in all the cars covered by the four bills of lading, introduced in evidence by plaintiff as shown by said bills of lading, was Eight Hundred Twenty-six Thousand and Six Hundred (826,600) pounds."

2. The copies of the tariff schedules of freight charges for the route over which the coke was shipped, certified by the Secretary of the Interstate Commerce Commission, shall not be copied into the bill of exceptions, but in lieu of copying them into the bill of exceptions, the following statement shall be inserted therein: "The plaintiff then introduced in evidence certified copies of the schedules of freight charges applicable to the route over which the coke was shipped, as the said tariff schedules appeared on file with the Interstate Commerce Commission. The combined aggregate of said freight rates from Holt, Alabama, to Mayer, Arizona, amounted to \$21.00 per ton of 2000 pounds."

It is further stipulated and agreed that there shall be included in the bill of exceptions the direct and cross interrogatories propounded to the witness Herman A. Wagner, examined on behalf of the plaintiff and the objections filed by the defendant to the direct interrogatories to said witness, and an exact copy of the deposition of said witness omitting the certificate of the Commissioner and the caption of the deposition, and the bill of exceptions shall also include the direct and cross interrogatories propounded to the witness Charles Batre and the objections of the defendant to the cross interroga-

tories propounded to said witness, and an exact copy of the deposition of said witness omitting the caption and the certificate of the Commissioner.

It is further stipulated and agreed that the record shall contain all pleadings in the cause and amendments thereto, the bill of exceptions, and the judgment entry, and the necessary formal matters pertaining to the writ of error.

Witness the hands of the Attorneys for the parties, this the 26th day of January, 1922.

FOSTER, VERNER & RICE,
Attorneys for Plaintiff.

H. A. & D. K. JONES,
Attorneys for Defendant.

PETITION FOR WRIT OF ERROR

Filed February 4, 1922

CHAS. J. ALLISON, Clerk

*IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DIVISION OF THE NORTH-
ERN DISTRICT OF ALABAMA.*

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, a Corporation, *Plaintiff.*

vs.

No. 111

CENTRAL IRON & COAL COMPANY,
a Corporation, *Defendant.*

Louisville & Nashville Railroad Company, plaintiff
in the above entitled cause, feeling itself aggrieved by the

verdict of the jury, and the judgment entered on the 28th day of October, 1921, comes now by Foster, Verner & Rice, its attorneys, and petitions the court for an order allowing said plaintiff to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Fifth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Fifth Circuit.

And your petitioner will ever pray.

FOSTER, VERNER & RICE,
Attorneys for Plaintiff.

J. W. FOSTER,
JAMES RICE,
Attorneys for Plaintiff.

FLEETWOOD RICE,
R. C. FOSTER,
Of Counsel.

ORDER ALLOWING WRIT OF ERROR

Filed February 4, 1922

CHAS. J. ALLISON, Clerk

*IN THE UNITED STATES DISTRICT COURT IN
AND FOR THE WESTERN DIVISION OF THE
NORTHERN DISTRICT OF ALABAMA.*

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, a Corporation, *Plaintiff.*

vs.

No. 111

CENTRAL IRON & COAL COMPANY,
a Corporation, *Defendant.*

Present the Honorable W. I. Grubb, District Judge.

Upon motion of J. M. Foster, attorney for the plaintiff, and upon filing a petition for a writ of error, and an assignment of errors, it is ordered that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Fifth Judicial Circuit the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and hereby is, fixed at five hundred dollars.

February 4, 1922.

W. I. GRUBB,
District Judge.

ASSIGNMENT OF ERROR

Filed February 4, 1922

CHAS. J. ALLISON, Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DIVISION OF THE NORTH-
ERN DISTRICT OF ALABAMA.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, a Corporation, *Plaintiff*.

vs.

No. 111.

CENTRAL IRON & COAL COMPANY,
a Corporation, *Defendant*.

Comes now the plaintiff and files the following assignments of error upon which it will rely upon its prosecution of the writ of error in the above entitled cause:

I.

A. That the United States District Court in and for the Western Division of the Northern District of Alabama erred in overruling the demurrer interposed by plaintiff in said court and plaintiff in error to the defendant's plea numbered 12.

II.

B. That the said court erred in refusing to give to the jury the following instruction, requested in writing by plaintiff in error, to-wit: "The court charges the

jury that if they believe all the evidence in this case, they must find a verdict for the plaintiff."

III.

C. That the said court erred in giving at the request of the defendant in error the following instructions to the jury: "I charge you gentlemen of the jury, that if you believe all the evidence in this case, you must find your verdict for the defendant."

WHEREFORE, the said Louisville & Nashville Railroad Company, plaintiff in error, prays that the judgment of the said District Court in and for the Western Division of the Northern District of Alabama be reversed, and that the said District Court be directed to grant a new trial of said cause.

FOSTER, VERNER & RICE,
J. M. FOSTER & JAMES RICE,
Attorneys for Plaintiff in Error,
Plaintiff in the Lower Court.

FLEETWOOD RICE,
R. C. FOSTER,
Of Counsel.

APPEAL BOND
Filed February 4, 1922
CHAS. J. ALLISON, Clerk

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DIVISION OF
THE NORTHERN DISTRICT OF ALABAMA.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY, a Corporation, *Plaintiff.*

vs.

No. 111

CENTRAL IRON & COAL COMPANY,
a Corporation, *Defendant.*

*Bond on Writ of Error of the United States Circuit
Court of Appeals for the Fifth Judicial Circuit.*

KNOW ALL MEN BY THESE PRESENTS: That we, the undersigned Louisville & Nashville Railroad Company, a corporation, plaintiff in error, and plaintiff in the District Court, as principal, and Foster, Verner & Rice, a partnership, and J. M. Foster and Fleetwood Rice, as sureties, are held and firmly bound unto Central Iron & Coal Company, a corporation, defendant in error, and defendant in the District Court, in the penal sum of Five Hundred (\$500.00) Dollars for the payment of which well and truly to be made we bind ourselves and each of us, and our and each of our successors and personal representatives, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is such that whereas a judgment in said cause was rendered in the District Court against the above bounden Louisville & Nashville Railroad Company, plaintiff in said cause in the District Court, and said Louisville & Nashville Railroad Company has sued out therein a writ of error to the United States Circuit Court of Appeals for the Fifth Judicial Circuit to review the said judgment in said Circuit Court of Appeals.

NOW, THEREFORE, if the said Louisville & Nashville Railroad Company shall prosecute its said writ of error to effect, or, if it shall fail to make its plea good, shall answer all costs in said District Court and in said Circuit Court of Appeals, this obligation shall be void, otherwise it shall remain in full force and effect.

Signed, sealed with our seals, and dated this 26th day of January, 1922.

LOUISVILLE & NASHVILLE RAILROAD CO.

By GEO. W. JONES, *Its Atty. in Fact.*

FOSTER, VERNER & RICE (SEAL)

J. M. FOSTER (SEAL)

FLEETWOOD RICE (SEAL)

Taken and approved this 4th day of February, 1922.

W. I. GRUBB,
District Judge.

Filed February 4, 1922
CHAS. J. ALLISON, Clerk

WRIT OF ERROR
Filed February 4, 1922
CHAS. J. ALLISON, Clerk

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the Honorable, the Judge of the District Court of the United States for the Northern District of Alabama, GREETINGS:

Because in the record and proceedings, as well as in the rendition of the judgment of a plea which is in said District Court before you, between Louisville & Nashville Railroad Company, a corporation, plaintiff in error, and Central Iron & Coal Company, a corporation, defendant in error, a manifest error hath happened to the great damage of the said Louisville & Nashville Railroad Company, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at the city of New Orleans, in the State of Louisiana, on the-----day of-----next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the

said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, the 4th day of February, One Thousand Nine Hundred and Twenty-two.

CHAS. J. ALLISON,
*Clerk of the United States District Court
for the Northern District of Alabama.*

Allowed by:

W. I. GRUBB,
District Judge.

CITATION

UNITED STATES OF AMERICA

The President of the United States,
To Central Iron and Coal Company, a Corporation,
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fifth Judicial Circuit to be holden at New Orleans, La.

Pursuant to a Writ of Error filed in the Clerk's

Office of the District Court of the United States for the Western Division of the Northern District of Alabama, wherein Louisville & Nashville Railroad Company, a Corporation, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, The Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this 4th day of February, in the year of our Lord one thousand nine hundred and twenty-two.

W. I. GRUBB,
District Judge.

We hereby accept service of an exact copy of the within citation and waive any other or different or additional service thereof.

Dated this February 11th, 1922.

H. A. & D. K. JONES,
Attorneys for Central Iron & Coal Company,
a Corporation.

CLERK'S CERTIFICATE

*United States of America,
Northern District of Alabama.*

I, Chas. J. Allison, Clerk of the District Court of the United States for the Northern District of Alabama, Southern Division, do hereby certify that the foregoing pages, numbered from one (1) to one hundred thirty-eight (138), both inclusive, is a full, true and correct transcript of the record in the matter of Louisville & Nashville Railroad Company, Plaintiff in Error, against Central Iron & Coal Company, Defendant in Error, as fully as the same appears of record and on file in my office.

In testimony whereof I have hereunto subscribed my hand and affixed the seal of said court on this the

20

day of March, 1922.

Chas. J. Allison

Clerk United States Court,
Northern District of Alabama.

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

No. 3859.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

versus

CENTRAL IRON AND COAL COMPANY.

ARGUMENT AND SUBMISSION.

Extract from the Minutes of October 18th, 1922.

On this day, this cause was called, and, after argument by Homer W. Davis, Esq., for plaintiff in error, and Henry A. Jones, Esq., for defendant in error, was submitted to the Court.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3859.

[Title omitted.]

Error to the District Court of the United States for the Northern District of Alabama.

OPINION OF THE COURT.

[Filed October 27th, 1922.]

Homer W. Davis (J. M. Foster, Foster, Verner & Rice, Gardiner Lathrop, Paul Burks, also on the brief), for Plaintiff in Error.

Henry A. Jones (and Jones, Jones & Van De Graaff, on the brief), for Defendant in Error.

Before Walker, Bryan, and King, Circuit Judges.

King, Circuit Judge:

Louisville & Nashville Railroad Company (styled herein railroad) on January 8, 1920, brought a suit in the United States District Court for the Northern District of Alabama against Central Iron & Coal Company (styled herein consignor) to recover the sum of \$3,683.46 with interest, as an undercharge on ten carloads of coke shipped from Holt, Ala., to Mayer, Ariz., consigned to the order of Tutwiler & Brooks, notify Great Western Smelters Corporation (styled herein corporation) at Mayer, Ariz. Said shipment was routed over the lines of the plaintiff railroad to New Orleans; thence by the Southern Pacific line to El Paso, Tex., and thence by the

Santa Fe lines to Mayer, Ariz. The legal freight charge for such shipment was \$8,545.61. By mistake only \$5,082.15 was collected at destination from said corporation. This suit is for the difference between said sums.

Consignor pleaded that it had sold before shipment the coke to Tutwiler & Brooks f. o. b. cars at Holt, Ala.; that Tutwiler & Brooks in turn had sold the coke to said corporation, under a contract providing that it should pay the freight; that pursuant to instructions of Tutwiler & Brooks on January 7, 1917, said railroad received said coke for transportation and the consignor billed the coke to the order of Tutwiler & Brooks, notify said corporation at Mayer, Ariz.; that said coke on delivery to said railroad became the property of said Tutwiler & Brooks; that the bills of lading were delivered at once by the consignor to Tutwiler & Brooks, who endorsed the same and drew on said corporation with bills of lading attached for the price it was to pay for said coke which it had purchased f. o. b. at Holt, Ala.; said draft and bills of lading were forwarded by Tutwiler & Brooks to a bank at Mayer which collected said draft and turned over the bills of lading to said corporation; that the delivering carrier thereupon collected from said corporation \$5,083.15 as the freight on said shipment and delivered to it said shipment.

That at the time said coke was delivered to said corporation, the delivering line had in its possession either a sum of money or a bond to secure the payment of any freight charges due on goods consigned to said corporation and delivered to said corporation without payment of freight or carrying charges, and it could have collected said alleged undercharge from said corporation at any time up to the time of institution of this suit.

There was evidence introduced sufficient to sustain said plea. In addition said bills of lading which were introduced provided that every service to be performed thereunder should be subject to all the conditions thereof including those on the back thereof.

There was testimony that until April 15, 1920, said corporation was able and could have been compelled to pay said undercharge. The corporation at the time judgment was rendered was insolvent.

The plaintiff and defendant, each, requested the Court to direct a verdict in its favor. The Court directed a verdict in favor of the defendant.

The controlling question in the case is, was the consignor liable for the undercharge?

In this case the bills of lading were in such form as warranted the Court in holding that they indicated that Tutwiler & Brooks were the owners of the goods being shipped. The shipments were "to the order of Tutwiler & Brooks, notify Great Western Smelters Corporation." The bills of lading endorsed by Tutwiler & Brooks were presented by said corporation who paid the freight charges then demanded, and receives the goods as consignee.

The goods were shipped without prepayment of freight.

The bills of lading provided that "The owner or consignee shall pay the freight and average, if any, and all other lawful charges

accruing on said property, and, if required, shall pay the same before delivery."

The carrier surrendered the goods to the consignee, surrendering its lien thereon.

"The weight of authority seems to be that the consignee is *prima facie* liable for payment of the freight charges when he accepts the goods from the carrier." *Pittsburg &c. Ry. Co. v. Fink*, 250 U. S. 577, 581.

In the case above cited, it appeared that the carrier delivered the goods to the consignee and collected what each believed to be the correct freight charge. Discovering that such sum was an undercharge the carrier demanded of the consignee the additional amount of the legal charge. No agreement had been made with the consignee that he should pay the freight.

The Court, after stating that the weight of authority was that the consignee was *prima facie* liable for the freight charges when he accepts the goods from the carrier, said that however that may be under the statutes regulating interstate commerce, the rule was:

"Under such circumstances consistently with the provisions of the Interstate Commerce Act the consignee was only entitled to the merchandise when he paid for the transportation thereof the amount specified as required by the statute. For the legal charges the carrier had a lien upon the goods, and this lien could be discharged and the consignee become entitled to the goods only upon tender or payment of this rate. *Texas & Pacific Ry. Co. v. Mugg*, 202 U. S. 242. The transaction, in the light of the act, amounted to an assumption on the part of Fink to pay the only legal rate the carrier had the right to charge or the consignee the right to pay. This may be in the present as well as some other cases a hardship upon the consignee due to the fact that he paid all that demanded when the freight was delivered; but instances of individual hardship cannot change the policy which congress has embodied in the statute in order to secure uniformity in charges for transportation." *Ib.* 582.

Here there is proof that the consignee, the corporation, was bound by its contract of purchase to pay the freight charges. It purchased the goods f. o. b. cars at the initial point of shipment. The carrier dealt with it as the party liable for the freight, and collected what it erroneously thought to be the full freight charges and delivered the goods.

The facts clearly established that the corporation was the party liable for the carrier's charge. In this case the facts clearly show that the Central Iron & Coal Company had parted with all interest in the goods by sale to Tutwiler & Brooks. It was neither the owner, nor the consignee. The bills of lading were to the order of Tutwiler & Brooks. The bills of lading had been endorsed and delivered to the Smelters Corporation. It had demanded the goods and paid the freight then required.

By receiving the goods the Smelters Corporation became liable for this undercharge. Had it been only the agent of the consignor the law would have cast this liability on it. No contract with the

carrier could have relieved it. As the Supreme Court has said in a recent case——

"We think the doctrine announced in *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fink*, 250 U. S. 577, (November 10, 1919), is controlling, and that the liability of York & Whitney Company was a question of law. The transaction between the parties amounted to an assumption by the consignee to pay the only lawful rate it had the right to pay or the carrier the right to charge. The consignee could not escape the liability imposed by law through any contract with the carrier." *New York Central &c. Railroad Co. v. York & Whitney Co.*, 256 U. S. 406, 408.

See also *Western & Atlantic R. Co. v. Underwood*, 281 Fed. 891.

For nearly three years the matter rested in this condition. No sufficient reason for a failure to ascertain the facts and to proceed against the consignee is shown.

The evidence authorized a finding that the consignee remained solvent until after the present suit was filed.

Where under circumstances, such as those of this case, the carrier delivers to the consignee and collects the freight then considered due, though by error and undercharge, such conduct on the part of the carrier will be an election to collect from the consignee and it will not be permitted to sue the consignor for the balance. *Yazoo & M. V. R. Co. v. Zemurray*, 238 Fed. 789.

Both parties having requested the Court to direct a verdict, the action of the Court will not be disturbed if there was any evidence to support the verdict directed. *Beutell v. Magone*, 157 U. S. 154, 157.

We think the District Judge was warranted in directing a verdict for the defendant and the judgment of the District Court is affirmed.

[Title omitted.]

JUDGMENT.

Extract from the Minutes of October 27th, 1922.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiff in error, Louisville & Nashville Railroad Company, and the sureties on the appeal bond herein, Foster, Verner & Rice, a partnership, and J. M. Foster and Fleetwood Rice, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

the United States Circuit Court of Appeals for the Fifth Circuit.

[Title omitted.]

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME.

[Filed December 15th, 1922.]

Petition.

Your Petitioner, Louisville & Nashville Railroad Company, represents that it is aggrieved by a final judgment entered against it by the District Court of the United States for the Western Division of the Northern District of Alabama, October 28, 1921, which said judgment was, on October 27, 1922, affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, in an action at law then pending wherein this Petitioner was Plaintiff in Error and the Central Iron & Coal Company was Defendant in Error.

That said final judgment was entered and affirmed in said case in which the jurisdiction was not dependent entirely upon the opposite parties to the suit being citizens of different States, but that said courts also had jurisdiction of said case because it was one arising under "An Act to Regulate Commerce," approved February 4, 1887, and acts amendatory thereof and supplementary thereto, commonly known as "The Interstate Commerce Act," and the amount therein involved exceeds One Thousand Dollars (\$1,000.00), besides costs, being, to-wit, Three Thousand Four Hundred Sixty-three Dollars and forty-six Cents (\$3,463.46).

Wherefore, your Petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Fifth Circuit to the end that the record in said matter may be removed into the Supreme Court of the United States and that the error complained of by your Petitioner may be examined and corrected and said judgment reversed, and your Petitioner will ever pray. (Signed) Homer W. Davis, M. Foster, James Rice, Attorneys for Petitioner.

Writ of Error allowed upon plaintiff in error giving bond in the sum of \$500.00 with sufficient security and with condition to prosecute its writ of error to affect and if it fail to make its plea good to answer all damages and costs.

Dated Dec. 9, 1922. (Signed) R. W. Walker, Judge of the United States Circuit Court of Appeals for the Fifth Circuit.

In the United States Circuit Court of Appeals for the Fifth Circuit

[Title omitted.]

ASSIGNMENT OF ERRORS.

[Filed December 15th, 1922.]

Assignment of Errors and Prayer.

Now comes Louisville & Nashville Railroad Company, Plaintiff in Error above named, and says that the United States Circuit Court of Appeals for the Fifth Circuit erred in its decision and judgment in said cause, as appears from the record therein, and that the errors committed are as follows:

I.

The Circuit Court of the United States for the Fifth Circuit erred in refusing to hold that a consignor was primarily liable for interstate freight charges and bound to pay the same if the consignee failed to do so.

II.

Said Circuit Court of Appeals erred in refusing to hold that under the Interstate Commerce Act, the lawful tariffs, bills of lading, and the facts disclosed by the evidence Defendant in Error was liable for the amount sued for in said cause.

III.

Said Circuit Court of Appeals erred in holding that the evidence authorized a finding by the trial court that the consignee remained solvent until after the present suit was filed, and also was in error in holding that the financial circumstances of the consignee had any bearing whatsoever on the liability of the consignor, which was defendant in error.

IV.

Said Circuit Court of Appeals erred in holding that a carrier may by act or conduct, after the transportation of interstate freight is completed, elect to collect from the consignee and release the consignor from liability for freight charges.

V.

Said Circuit Court of Appeals erred in affirming the action of the District Court of the United States for the Western Division of the Northern District of Alabama in overruling the demurrer interposed by plaintiff in error to defendant in error's plea numbered 12.

VI.

Said Circuit Court of Appeals erred in affirming the action of said District Court in refusing to give to the jury at the close of all the evidence the following instruction requested in writing by plaintiff in error, to-wit: "The court charges the jury that if they believe all the evidence in this case, they must find a verdict for the plaintiff."

VII.

Said Circuit Court of Appeals erred in affirming the action of said District Court in giving to the jury at the close of all the evidence the following written instruction at the request of the defendant in error: "I charge you gentlemen of the jury, that if you believe all the evidence in this case, you must find your verdict for the defendant."

Wherefore, said plaintiff in error, Louisville & Nashville Railroad Company, prays that for the errors aforesaid the said judgment may be reversed.

Dated the 7th day of December, 1922. (Signed) Homer W. Davis, J. M. Foster, James Rice, Attorneys for Louisville & Nashville Railroad Company.

In the United States Circuit Court of Appeals for the Fifth Circuit.

[Title omitted.]

BOND ON WRIT OF ERROR.

[Filed December 15th, 1922.]

Bond.

Know all men by these presents that Louisville & Nashville Railroad Company, as principal, and Foster, Verner & Rice, J. M. Foster and James Rice, as sureties are held and firmly bound unto the above named Defendant in Error, Central Iron and Coal Company, a corporation, in the sum of Five Hundred Dollars (\$500.00), to be paid to it and for the payment of which we bind ourselves and our successors and assigns firmly by these presents.

Sealed with our seals and dated this 12th day of December, 1922. The condition of this obligation is such that, whereas the said Louisville & Nashville Railroad Company, Plaintiff in Error, seeks to prosecute its writ of error to the Supreme Court of the United States and to reverse the judgment rendered in the above entitled cause by the United States Circuit Court of Appeals for the Fifth Circuit.

Now, therefore, if the above named plaintiff in error shall prosecute its writ of error to effect and answer all costs and damages which may be adjudged, if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

(Signed) Louisville & Nashville Railroad Company, By Geo. M. Jones, As Its Atty.-in-Fact. (Signed) Foster, Verner & Rice. J. M. Foster. James Rice.

The foregoing bond is hereby approved as a supersedeas this 15th day of December, 1922. (Signed) R. W. Walker, Judge of the United States Circuit Court of Appeals for the Fifth Circuit.

In the United States Circuit Court of Appeals for the Fifth Circuit.

[Title omitted.]

PRÆCIPUE FOR TRANSCRIPT.

[Filed December 15th, 1922.]

To the clerk of the above-named court:

Will you please prepare transcript of record on writ of error carrying the above entitled cause to the Supreme Court of the United States for review, said transcript to consist of the following:

1. Transcript of all proceedings in the United States Circuit Court of Appeals for the Fifth Circuit, including the judgment entered therein and the opinion of the Court thereon.

2. The original petition for writ of error, original assignment of error, copy of bond, original writ of error, original citation, certificate of lodgment, your return to writ of error and this præcipe for transcript.

3. Your certificate.

(Signed) Homer W. Davis, J. M. Foster, James Rice, Attorneys for Louisville & Nashville Railroad Company, a Corporation.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 139 to 153 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3859 wherein the Louisville & Nashville Railroad Company is plaintiff in error and the Central Iron & Coal Company is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 138 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 22nd day of December, A. D. 1922. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. [Seal of United States Circuit Court of Appeals, Fifth Circuit.]

WRIT OF ERROR.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals before you, or some of you, between Louisville & Nashville Railroad Company, a corporation, plaintiff in error, and Central Iron & Coal Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said Louisville & Nashville Railroad Company, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the Fifteenth day of December, in the year of our Lord one thousand nine hundred and Twenty-two Fran. H. Mortimer, Clerk of the United States Circuit Court of Appeals. [Seal of United States Circuit Court of Appeals, Fifth Circuit.]

Allowed by R. W. Walker, United States Circuit Judge.

[File endorsement omitted.]

CITATION AND SERVICE.

[Filed Dec. 20, 1922.]

THE UNITED STATES OF AMERICA:

The President of the United States to Central Iron & Coal Company,
a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error sued out and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, in the cause wherein Louisville & Nashville Railroad Company, a Corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error and in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, this Fifteenth day of December, in the year of our Lord one thousand nine hundred and Twenty-two. R. W. Walker,
United States Circuit Judge.

[File endorsement omitted.]

Endorsed on cover: File No. 29,344. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 198. Louisville & Nashville Railroad Company, plaintiff in error, vs. Central Iron & Coal Company. Filed January 12th, 1923. File No. 29,344.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 198

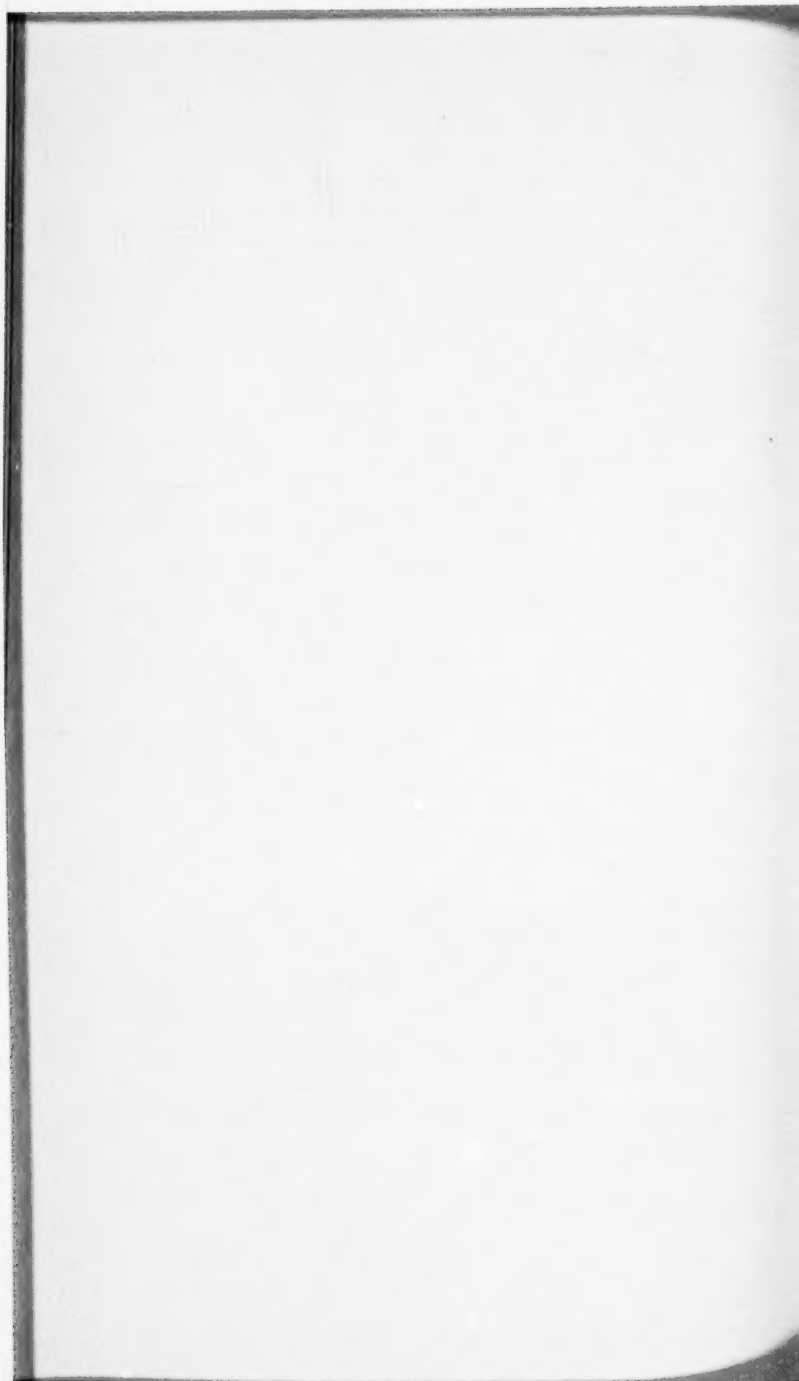
LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,
vs.

CENTRAL IRON & COAL COMPANY,
Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

GARDINER LATHROP,
HOMER W. DAVIS,
Attorneys for Plaintiff in Error.

EDWARD S. JOUETT,
FOSTER, VERNER & RICE,
Of Counsel.



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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 198.

LOUISVILLE & NASHVILLE RAILROAD COM-
PANY,

Plaintiff in Error,

vs.

CENTRAL IRON & COAL COMPANY,

Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN
ERROR.

STATEMENT OF THE CASE.

This writ of error is prosecuted for the purpose of bringing up for review by this court a judgment of the Circuit Court of Appeals for the Fifth Circuit, entered October 27, 1922 (284 Fed. 250), affirming a judgment of the District Court for the Western Division of the Northern District of Alabama, entered October 28, 1921, in an action brought by the Louisville and Nashville Railroad Company, plaintiff in error, against the Central Iron & Coal Company, the consignor, defendant in error, to recover \$3,463.46, the difference between the lawful interstate tariff rate and the amount actually

paid for the transportation of ten carloads of coke shipped from Holt, Alabama, consigned to the order of Tutwiler & Brooks, notify Great Western Smelters Corporation, the ultimate consignee, at Mayer, Arizona.

This action arose under the Interstate Commerce Act. The District Court had jurisdiction under paragraph eighth of Section 24 of the Judicial Code.

Those portions of the opinion of the Circuit Court of Appeals with reference to the pleadings and the facts are as follows (Trans., 139-142):

"Louisville & Nashville Railroad Company (styled herein railroad) on January 8, 1920, brought a suit in the United States District Court for the Northern District of Alabama against Central Iron & Coal Company (styled herein consignor) to recover the sum of \$3,463.46 with interest, as an undercharge on ten carloads of coke shipped from Holt, Ala., to Mayer, Ariz., consigned to the order of Tutwiler & Brooks, notify Great Western Smelters Corporation (styled herein corporation) at Mayer, Ariz. Said shipment was routed over the lines of the plaintiff railroad to New Orleans; thence by the Southern Pacific line to El Paso, Tex., and thence by the Santa Fe lines to Mayer, Ariz. The legal freight charge for such shipment was \$8,545.61. By mistake only \$5,082.15 was collected at destination from said corporation. This suit is for the difference between said sums.

Consignor pleaded that it had sold before shipment the coke to Tutwiler & Brooks f. o. b. cars at Holt, Ala.; that Tutwiler & Brooks in turn had sold the coke to said corporation, under a contract providing that it should pay the freight; that pursuant to instructions of Tutwiler & Brooks on January 7, 1917, said railroad received said coke for transportation and the consignor billed the coke to the order of Tutwiler & Brooks, notify said corporation at Mayer, Ariz.; that said coke on delivery to said railroad became the property of said Tutwiler & Brooks; that the bills of lading were delivered at once by the consignor to Tutwiler & Brooks, who

endorsed the same and drew on said corporation with bills of lading attached for the price it was to pay for said coke which it had purchased f. o. b. cars at Holt, Ala.; said draft and bills of lading were forwarded by Tutwiler & Brooks to a bank at Mayer which collected said draft and turned over the bills of lading to said corporation; that the delivering carrier thereupon collected from said corporation \$5,083.15 as the freight on said shipment and delivered to it said shipment.

That at the time said coke was delivered to said corporation, the delivering line had in its possession either a sum of money or a bond to secure the payment of any freight charges due on goods consigned to said corporation and delivered to said corporation without payment of freight or carrying charges, and it could have collected said alleged undercharge from said corporation at any time up to the time of the institution of this suit.

There was evidence introduced sufficient to sustain said plea. In addition said bills of lading which were introduced provided that every service to be performed thereunder should be subject to all the conditions thereof including those on the back thereof.

There was testimony that until April 15, 1920, said corporation was able and could have been compelled to pay said undercharge. The corporation at the time judgment was rendered was insolvent.

The plaintiff and defendant, each, requested the court to direct a verdict in its favor. The court directed a verdict in favor of the defendant."

"The bills of lading provided that 'The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property, and, if required shall pay the same before delivery.'

The carrier surrendered the goods to the consignee, surrendering its lien thereon."

"For nearly three years the matter rested in this condition. No sufficient reason for a failure to ascertain the facts and to proceed against the consignee is shown.

The evidence authorized a finding that the consignee remained solvent until after the present suit was filed."

* * * * *

"Both parties having requested the court to direct a verdict, the action of the court will not be disturbed if there was any evidence to support the verdict directed. *Beuttell v. Magone*, 157 U. S. 154, 157."

Inasmuch as the Railroad Company has assigned as error the finding of the Circuit Court of Appeals that the Great Western Smelters Corporation, the ultimate consignee, remained solvent until January 8, 1920, when this suit was brought, it will be necessary to refer to the evidence on that point.

Charles Battre of Boston, Mass., defendant's witness, gave his deposition some time prior to October 28, 1921, when the judgment was entered in the lower court. At the time he testified he had not been an officer of the Great Western Smelters Corporation for two years (Trans., 124 (b)); but from the date of its incorporation in 1916 until May, 1919, when he sold all his interests in the company, he occupied the position of active vice president and financed it. (Trans., 114 (d), (e).)

His company started operations in February, 1917, with the coke in question and discontinued operations the first of June next following. (Trans., 118 (d), (e).)

He further testified that there was a first mortgage bond issue of \$250,000 against the plant, nothing against the company's bank deposits. In 1918 or 1919 the Smelters Corporation was sold to the Big Ledge Copper Company. In April, 1920, the Big Ledge Copper Company defaulted on its interest on the bonds and the property of the corporation was foreclosed on by the bondholders. (Trans., 118 (h), (i).) One man held about all of the bonds. (Trans., 120 (a).) The witness did not know

what the property brought under foreclosure sale, but stated this could be ascertained by referring to the records at Prescott, Arizona. (Trans., 123 (b).) During the month of April, 1917, and from that time until April 15, 1920, the Great Western Smelters Corporation was able to pay and if it had declined to pay could have been forced to pay an indebtedness of \$3,463.46, and would have been good for an execution in that sum. (Trans., 121 (a), (b).)

According to this witness the alleged undercharge for freight on the shipments in question was first called to his attention and to the attention of any of the officers or agents of the Smelters Corporation in June, 1921.

The Railroad Company introduced in evidence the deposition of Herman A. Wagner, a consulting engineer, of Mayer, Arizona, who stated that the Great Western Smelters Corporation, early in the year 1917, purchased ores from the Big Ledge Copper Company and operated for about sixty days the plant of the old Treadwell Smelter, which it purchased in 1916; that the same was closed down in June, 1917, after which watchmen were maintained there but no business was done; that there was a chattel mortgage for about \$1,600 on the tools in the shop and that the plant was mortgaged for about \$300,000, which was largely in excess of its value; and that in November, 1920, the property was sold at foreclosure sale. The mortgagee, one John Borg of New York, bid in the property for about one-half the amount of the mortgage and *the witness afterwards purchased it from him and sold it to a third party, and, consequently, was familiar with the plant and the mortgages.* (Trans., 78-81.)

As to the lawful charges, the amount paid, and the fact that \$3,463.46 never has been paid, there is no dispute.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Circuit Court of the United States for the Fifth Circuit erred in refusing to hold that a consignor was primarily liable for interstate freight charges and bound to pay the same if the consignee failed to do so.

2. Said Circuit Court of Appeals erred in refusing to hold that under the Interstate Commerce Act, the lawful tariffs, bills of lading, and the facts disclosed by the evidence, defendant in error was liable for the amount sued for in said cause.

3. Said Circuit Court of Appeals erred in holding that the evidence authorized a finding by the trial court that the consignee remained solvent until after the present suit was filed, and also was in error in holding that the financial circumstances of the consignee had any bearing whatsoever on the liability of the consignor, which was defendant in error.

4. Said Circuit Court of Appeals erred in holding that a carrier, after the transportation of interstate freight is completed, may by act or conduct elect to collect from the consignee and release the consignor from liability for freight charges.

5. Said Circuit Court of Appeals erred in affirming the action of the District Court of the United States for the Western Division of the Northern District of Alabama in overruling the demurrer interposed by plaintiff in error to defendant in error's plea numbered 12.

6. Said Circuit Court of Appeals erred in affirming the action of said District Court in refusing to give to the jury at the close of all the evidence the following instruction requested in writing by plaintiff in error, to wit: "The court charges the jury that if they believe all the evidence in this case, they must find a verdict for the plaintiff."

7. Said Circuit Court of Appeals erred in affirming the action of said District Court in giving to the jury at the close of all the evidence the following written instruction at the request of the defendant in error: "I charge you gentlemen of the jury, that if you believe all the evidence in this case, you must find your verdict for the defendant."

BRIEF OF ARGUMENT.

I.

PRIOR TO THE PASSAGE OF THE INTERSTATE COMMERCE ACT, IT WAS UNIFORMLY HELD THAT THE SHIPMENT OF GOODS UNDER A BILL OF LADING CONTAINING NO EXPRESS PROVISION REQUIRING PAYMENT OF FREIGHT BY THE CONSIGNOR, IMPLIEDLY BOUND HIM SO TO DO, IRRESPECTIVE OF WHETHER OR NOT HE WAS THE OWNER OF THE GOODS SHIPPED.

The rule that the usual clause in bills of lading providing for payment of freight by the consignee and the custom of collecting freight charges from the consignee is merely for the benefit and accommodation of the shipper, who, at all times, is legally liable for the charges, was uniformly recognized before railroad transportation existed and has been adhered to since.

A review of early authorities is contained in the case of *Wooster v. Tarr*, 8 Allen 270, which was an action brought against the consignor to recover freight charges on a shipment of mackerel which "at the time of their delivery on board the vessel had been purchased and paid for by the defendants for and on account of Howes & Company, at whose risk they were after shipment."

In holding that the consignor was liable, the Court said:

"The question raised in this case is very fully discussed in *Blanchard v. Page*, 8 Gray 281, 286, 290-295. It is there stated to be the settled doctrine that a bill of lading is a written simple contract between a shipper of goods and the shipowner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed. Of the correctness of this statement there can be no doubt. The shipper or consignor, whether the

owner of the goods shipped or not, is the party with whom the owner or master enters into the contract of affreightment. It is he that makes the bailment of the goods to be carried, and, as the bailor, he is liable for the compensation to be paid therefor. The dictum of Bailey, J., in *Moorson v. Kymer*, 2 M. & S. 318, subsequently repeated by Lord Tenterden in *Drew v. Bird*, Mood. & Malk. 156, that, in the absence of an express contract by the shipper to pay freight, when the goods are by the bill of lading to be delivered on payment of freight by the consignee, no recourse can be had for the price of the carriage to the shipper, has been distinctly repudiated, and cannot be regarded as a correct statement of the law. *Saunders v. Van Zeller*, 4 Q. B. 260, 284; *MacLachlan on Shipping*, 426. * * * A master is not bound at his peril to enforce payment of freight from the consignees. *The usual clause in bills of lading, that the cargo is to be delivered to the person named or his assignees, 'he or they paying freight,' is only inserted as a recognition or assertion of the right of the master to retain the goods carried until his lien is satisfied by payment of freight; but it imposes no obligation on him to insist on payment before delivery of the cargo. If he sees fit to waive his right of lien, and to deliver the goods without payment of the freight, his right to resort to the shipper for compensation still remains. Shepard v. De Bernales, 13 East. 565; Domett v. Beckford, 5 B. & Ad. 521, 525; Christy v. Row, 1 Taunt. 300. Although the receipt of the cargo under a bill of lading in the usual form is evidence from which a contract to pay the freight money to the master or owner may be inferred, this is only a cumulative or additional remedy, which does not take away or impair the right to resort to the shipper on the original contract of bailment for the compensation due for the carriage of the goods.'*

The reason for the rule is fully discussed by Chief Justice Shaw in *Blanchard v. Page*, 8 Gray 281, in which, on page 285, he says:

"It seems to us well established that a bill of

lading constitutes a written simple contract between the shipowner and the shipper, that is, the person who on the bill of lading appears to be the shipper, without words showing that he acts in a representative capacity binding the shipowner to the shipper, and subjecting him to the liabilities of a common carrier of goods by sea, for instance, to stow and keep the goods safely, and carry them to the place of destination mentioned, and deliver them to the shipper himself, or to a person named by him, or to the indorsee of such person, or, if the name be left blank, to a person to be named afterwards (with usual exceptions), he or they (consignee or his assigns) paying freight, etc.; and binding upon the shipper to pay freight to the shipowner, or his agent, at the rates stipulated, on delivery of the goods at the place of destination, if they arrive in safety, and the shipowners, by their agent, the master, are then ready to deliver them, on such payment being made or tendered.

The bill of lading does not contain express words importing promise, contract or stipulation; but it contains words equivalent. It is an acknowledgment of the receipt of the goods, for the purpose of carriage, that they are received of A. B., the shipper, and in the absence of any such words as, 'for account and risk of C. D.' or, 'by order or for account of E. F.,' the consignee, and *in the absence of any terms describing the shipper as an agent, or stating the property to be in another person, no presumption can arise in favor of any other party.* It is an admission on the part of the shipowner, that he has received the goods from the shipper, and that the possession came to him from the shipper; that he is the owner, or has the power of an owner, and has a right to direct the destination of the goods, and has good right to contract with the shipowner for their safe carriage."

And on page 290 he continues:

"One test question in such case seems often to have been, who is to pay the freight? and it has been supposed that the right to bring the action depends, to some extent, on determining this question. We suppose the question to have presented

itself thus: The contract to carry, and the contract to pay freight for the carriage, are considerations for each other; if, therefore, there is no contract on the part of the shipper to pay the freight, the promise on the other side is made on no consideration moving from him, the promise to him is *nudum pactum*, and no action lies. There would be much ground to sustain this conclusion, if the premises were sound. But we are of opinion that, upon the ordinary contract of shipment, manifested by a bill of lading, made by one party and accepted by the other, it is a contract in the nature of a deed poll, mutual obligations arise between the contracting parties, on the one side to carry the goods, and on the other to pay the stipulated compensation for that service; that these are mutual considerations for each other, and make them legal obligations on which actions will lie.

In the ordinary form of a bill of lading, there is no express stipulation on the part of the shipper to pay freight, but his liability results from having engaged the shipowner to take on board and carry the goods at his instance. This we think, is well settled both upon principle and authority.

In point of fact, we think it seldom happens, in case of carriage of goods by sea, that the consignee does pay the freight, either in advance or ultimately, and this, perhaps, has led to a doubt, whether a shipper, without proof of other interest or property in the goods, is liable for freight. The reasons why a shipper does not often, in fact, pay freight, are obvious.

In the first place, freight is not payable, unless the goods arrive at the place of destination. If they are lost by perils of the sea, whilst the owner stands to the loss of the goods, the carrier loses the freight. Freight is therefore seldom paid in advance.

Again, the carrier has a lien on the goods, which is commonly a much better security for his freight than the personal liability of the shipper or anybody else. The consignee, in paying the freight, to discharge this lien, discharges at the same time the liability of the shipper, and exonerates him.

And further, a bill of lading making the goods

deliverable to a consignee or his order, contains a stipulation to this effect, 'he or they paying freight for the same.' This is inserted for the benefit of the shipper, as if it were, 'if on or condition that he or they pay the freight.' "

And on page 295, after considering the decided cases, the following conclusion is reached:

"It seems to be thus well established, that a bill of lading is a written simple contract, between a shipper of goods and a ship owner, the latter to carry the goods and the former to pay the stipulated compensation for that service. We have seen that by its original terms, or by any assignment or endorsement of it, it does not create any obligation on the part of the consignee named, or any assignee or endorsee, to pay the freight; but if either of these parties does become liable for freight, it is by after act, or express or implied agreement. It follows, as a necessary legal consequence, that the shipper is bound to pay the freight."

In the case of *Holt v. Westcott*, 43 Me. 445, it does not clearly appear what the facts were, but the following is taken from the brief of counsel for the plaintiff:

"Some of the authorities would seem to imply that where the goods were the property of the consignee, the consignor might not be liable, as where he was merely an agent. But the current of authorities do not allow of this distinction, *for if he would protect himself from liability, he could ship them in the name of his principal, as well as consign them to him.* However this may be, the inference from the testimony is, that Westcott & Co. were the owners of the cargo; that it was shipped for their benefit, and to fill their contract, and therefore they were liable."

After examining a number of the English and American cases, the Court says:

"Without further citations, we think the general rule deducible from them to be, that in all cases *where goods are shipped by a consignor under a contract, or for his benefit, he is originally liable for*

freight, and that the insertion in a bill of lading of a provision that the goods are to be delivered to the consignee, etc., 'he or they paying the freight,' will not, of itself, relieve him from that liability; that provision being designed for the benefit of the carrier, he may waive it if he choose to do so, and resort to his employer, the consignor, for his freight, unless there is some special stipulation by which that employer is to be exonerated."

See also:

Portland Flouring Mills Co. v. British and Foreign Marine Insurance Co. 130 Fed. 860.

Hutchinson on Carriers, 3rd Ed., Sec. 810.

7 English & American Encyclopedia of Law, 2nd Ed. 260.

Elliott on Railroads, Sec. 1659.

II.

THE REASONS WHICH OBTAINED PRIOR TO THE INTERSTATE COMMERCE ACT FOR HOLDING A SHIPPER PRIMARILY LIABLE WERE AUGMENTED BY THE PASSAGE OF SAID ACT. IN THIS CASE THE CONSIGNOR IS LIABLE UNDER THE ADMITTED FACTS.

While, as hereinbefore stated, the old authorities were practically unanimous that a shipper who executed a bill of lading was liable for the freight charges, irrespective of whether or not he was the owner of the goods, there was some contrariety of opinion regarding the liability of the consignee.

But, in passing on the liability of the consignee, in the case of *Pittsburgh, etc., Railway Co. v. Fink*, 250 U. S. 577, the Court made it plain that the question in such cases was not one depending for its answer on decisions in cases not involving the Federal Act, saying, on pages 580, 582:

"Examination shows some conflict of authority as

to the liability at common law of the consignee to pay freight charges under the circumstances here shown. The weight of authority seems to be that the consignee is *prima facie* liable for the payment of the freight charges when he accepts the goods from the carrier. (See the cases collected and discussed in 4 Elliott on Railroads, 1559.) *However this may be, in our view the question must be decided upon consideration of the applicable provisions of the statutes of the United States regulating interstate commerce.* * * *

The transaction, in the light of the act, amounted to an assumption on the part of Fink to pay the only legal rate the carrier had the right to charge or the consignee the right to pay. This may be in the present as well as some other cases a hardship upon the consignee due to the fact that he paid all that was demanded when the freight was delivered; but *instances of individual hardship cannot change the policy which Congress has embodied in the statute in order to secure uniformity in charges for transportation.* * * *

It is alleged that a different rule should be applied in this case because Fink by virtue of his agreement with the consignor did not become the owner of the goods until after the same had been delivered to him. *There is no proof that such agreement was known to the carrier, nor could that fact lessen the obligation of the consignee to pay the legal tariff rate when he accepted the goods.* *Pennsylvania R. R. Co. v. Titus*, 216 N. Y. 17. Nor can the defendant in error successfully invoke the principle of estoppel against the right to collect the legal rate. *Estoppel could not become the means of successfully avoiding the requirement of the act as to equal rates, in violation of the provisions of the statute.* *New York, New Haven & Hartford R. R. Co. v. York & Whitney*, 215 Massachusetts 36, 40."

In *New York Central & Hudson River R. Co. v. York & Whitney Co.* 230 Mass. 206, 119 N. E. 855, it appeared that a consignee before receiving six carloads of cantaloupes notified the railroad company that it was handling the goods on a commission and inquired what the charges

were for the purpose of deciding whether to accept them or not. The Supreme Judicial Court of Massachusetts, in an exhaustive opinion, held that under such circumstances the consignee was not liable for an undercharge thereafter discovered.

But in *New York Central & Hudson River R. Co. v. York & Whitney Co.* 256 U. S. 406, the Supreme Court of the United States, in reversing the court below, said:

"Commission merchants often receive from strangers shipments of perishable articles for sale at market prices. Under a trade custom such things are promptly disposed of and the net proceeds remitted to the consignors. Successful conduct of the business requires prompt settlements. The court below held that whether York & Whitney Company impliedly agreed to pay the rates imposed by law was a question of fact to be determined upon consideration of all the circumstances. * * *

We think the doctrine announced in *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fink*, 250 U. S. 577 (November 10, 1919), is controlling, and that the liability of York & Whitney Company was a question of law. The transaction between the parties amounted to an assumption by the consignee to pay the only lawful rate it had the right to pay or the carrier the right to charge. The consignee could not escape the liability imposed by law through any contract with the carrier."

Although it is true that the above decisions relate only to the consignee's liability, their reasoning applies to this case, and they plainly show that instances of occasional hardship must not be allowed to stand in the way of the collection of tariff rates and the enforcement of the provisions of the Interstate Commerce Act, which has for its object the abolition of the numerous abuses which existed before it was enacted.

Only a nominal hardship is imposed on a consignor by holding him liable for an undercharge when the consignee is solvent. It is only when the consignee is insolvent that an actual hardship arises.

At this point it seems pertinent to observe that if, as claimed by the consignor and found by the Courts below, the ultimate consignee was solvent up to the time suit was brought, then any hardship which either consignor or the bill of lading consignee would suffer, should the consignor by the judgment of this court be now held liable, is the result of the course pursued by the consignor in this case.

It is undisputed that demand was made on the consignor before suit was brought and that the consignor had a contract for the sale of the coke f. o. b. Holt, Alabama, to the firm of Tutwiler & Brooks of Birmingham, Alabama, the bill of lading consignee.

Instead of paying the undercharge and making collection from either Tutwiler & Brooks or the Smelter Corporation, the consignor, so far as the record shows, did nothing before, or for over fifteen months after, the suit was brought when it filed a demurrer to the complaint.

If, as testified in 1921 by the ex-vice president of the Smelter Corporation, his company was solvent up to January, 1920, and for three months thereafter and during that time could have been forced to pay the amount due on execution, there is no reason why the consignor and Tutwiler & Brooks could not have made collection during that period from the Smelter Corporation, since the purchase of goods f. o. b. a given point with directions to the consignor to ship to some other point, and the payment of the purchase price, unquestionably binds the purchaser to see that the consignor or the party from

whom the goods are purchased is not thereafter held liable for the freight charges.

If the doctrine laid down by the Circuit Court of Appeals is upheld, then silence and inaction on the part of the Railroad Company, when it works a real hardship on the consignor, is no defense; but if it works only a nominal hardship, it is a complete defense.

The Circuit Court of Appeals impliedly recognizes and the courts uniformly have held that if the consignee actually becomes insolvent before suit is brought against the consignor, then the consignor must pay. In such a case the consignor could not recoup himself.

Neither estoppel nor election can become the means of avoiding payment of tariff rates.

In this case, as stated by the Circuit Court of Appeals in its opinion, the ultimate consignee became insolvent before the trial but the Court held that the Railroad Company by its conduct estopped itself from making collection from the consignor. The Court did not use the word "estopped," probably by reason of the language used by this Court in the case of *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fink*, 250 U. S. 577, *supra*, but said that such conduct amounted to an "election to collect from the consignee" which would be a defense to a suit against the consignor. (Trans., 142.)

But no reason is given by the Circuit Court of Appeals in explanation of its position that while by conduct a carrier could not raise an estoppel which would release a consignor, yet by the same kind of conduct it could make an election which would have that effect.

It has frequently been held that the doctrine of elec-

tion of remedies is simply an application of the law of estoppel.

Crockett First National Bank v. George R. Barse Live Stock Commission Co. 198 Ill. 232, 64 N. E. 1097.

Baker v. Edwards, 176 N. C. 229, 233, 97 S. E. 16.

Warriner v. Fant, 114 Miss. 174, 181, 74 S. 822.

“Election is simply what its name imports; a choice, shown by an overt act, between two *inconsistent* rights, either of which may be asserted at the will of the chooser alone.”

Wm. W. Bierce, L'd. v Hutchins, 205 U. S. 340, 346.

If the collection of a part of the freight charges from a consignee, who remained solvent until the suit was brought, amounts to an election to collect all of them from the consignee, it is difficult to see why the collection of part of the freight charges from the consignee who afterwards, but before suit is brought, becomes insolvent, does not also amount to an election.

Certainly, any election must arise out of some act of the party who has the choice of remedies and not out of an act or change in the financial responsibility of someone else, and in either of those cases the only act of the Railroad Company would be to collect part of the charges upon delivery at destination.

Furthermore, as shown above, election applies in the case of inconsistent and not alternative remedies. *Friedrichsen v. Renard*, 247 U. S. 207. In the case of consignor and consignee, it would not be inconsistent to sue both of them at the same time for freight charges, although recovery from either would bar the suit against the other. The rights of the carrier to hold either or

both are alternative or cumulative. In the language of Mr. Justice Pitney in *Central R. Co. of N. J. v. MacCartney*, 68 N. J. L. 165, 52 Atl. 575, "*the two contracts are held to be independent, and not inconsistent one with the other.*" The object is to insure payment of lawful tariff rates.

The Zemurray Case.

The only authority cited by the Circuit Court of Appeals was one of its prior decisions, *Yazoo & M. V. R. Co. v. Zemurray*, 238 Fed. 789.

In that case the shipment was sold f. o. b. point of shipment but suit was brought against the consignor. The trial Court, whose opinion was quoted by the Court of Appeals, admitted that the weight of authority seemed to be that the carrier could waive its lien and deliver the freight and hold either the consignee or consignor, but said:

"However, in deciding the case against the plaintiff, I did so because I was satisfied the railroad could have collected from the consignee, if it had sued him; that having elected to collect the freight from the consignee, who was the owner of the fruit and bound to pay the freight ultimately, it would be inequitable to permit the carrier to change its base and proceed against the consignor, who was only technically liable. Conceding that Zemurray was primarily liable to the railroad because of having made the contract, the mode of shipment was *prima facie* notice to the carrier that the shipper had parted with ownership on delivery of the goods to it and that the shipment was for account of the consignee. Before suit, the railroad was advised of the actual facts, and property of the consignee subject to execution pointed out. Considering all this, I see no reason to change my opinion."

The Court of Appeals, in affirming the judgment, used the following language:

"We might rest our decision upon the facts and

reasons as given by Judge Foster, but we deem it proper to go further.

On the facts stated, we doubt the jurisdiction of the court on the ground that the amount involved is less than \$3,000. It appears to be a case of ordinary collection of a freight bill wherein the carrier through error and neglect failed to collect the stipulated freight from the consignee, and now sues the consignor.

We find no question in this case involving the Elkins law, or any other interstate commerce laws.
• • •

Waiving, however, the question of jurisdiction we find no reversible error in the proceedings of the District Court."

It will be noted that the Circuit Court of Appeals, in that case, reached a conclusion that no question of Federal law was involved, which is contrary to the conclusion reached by this Court in the *Fink* case, *supra*, and contrary to the conclusion reached by numerous other Courts as will be hereafter shown. That an action of the character here involved arises under the Interstate Commerce Act, and that, regardless of the amount involved, the District Courts have jurisdiction under Section 24, par. 8 of the Judicial Code, has been held in the following cases:

A. T. & S. F. Ry. Co. v. Kinkade (D. C.), 203 Fed. 165.

Illinois Central R. R. Co. v. Segari (D. C.), 205 Fed. 998.

Wells Fargo & Co. v. Cuneo, 241 Fed. 726.

Furthermore, in the case of *Western & Atlantic R. Co. v. Underwood* (D. C.), 281 Fed. 891, referred to by the Circuit Court of Appeals in its opinion, only \$93 was sued for, and jurisdiction must have been taken on the ground that the action arose under the Interstate Commerce Act.

In both *Duncan (Receiver) v. United Steel Co.* 244 Fed. 258, and *Great Northern v. Hyder*, 279 Fed. 783, suit was brought to recover an undercharge on *one* car-load of freight.

It is apparent from the opinion of the court in the *Zemurray* case that the jurisdictional point was not raised by the defendant and that the case was not decided with reference to any bearing a decision might have on the enforcement of the Act to Regulate Commerce.

It will be noted the Court apparently placed the burden of showing the insolvency of the consignee on the carrier, although it was shown the consignee refused to pay.

That as between the consignor and consignee the latter was equitably liable was decided on *ex-parte* evidence. The consignee's side of the story was not heard.

If he had been before the Court he might have shown, as often is the case, that the consignor misrouted the shipment which was the cause of the extra charges.

In the case at bar, if the Court had had the power to finally determine liability as between the consignor and consignee, and to require the one equitably liable to pay, the same situation might have developed. Presumably, the entire contract of sale was put in evidence and there is nothing to show the consignor was directed to route the coke, yet it did so. (Trans., 60.) The consignee actually paid \$12.50 a ton freight charges, while over the route the shipment moved the rate was \$21 a ton, and the shipment moved prior to the advances in rates made by the Director General.

Cases in other jurisdictions as to consignor's liability:

The Interstate Commerce Commission and numerous Courts have passed on the question involved in this case in the light of the Interstate Commerce Act and

almost without exception hold that the consignor must pay if the consignee does not.

"The shipper, the carrier, and the consignee are all agents and trustees for the public, and no complications arising out of the agreements between them, or shuffling, should defeat the purpose of the act requiring the full and exact payment of the freight as fixed by the filed, posted, and published tariff."

Great Northern Ry. Co. v. Hyder, 279 Fed. 783, 786.

In a recent case before the New York Court of Appeals, *New York Central R. R. Co. v. Federal Sugar Refining Company*, 235 N. Y. 182; 139 N. E. 234, the refining company, which was sued as the consignor in an order bill of lading, sought to avoid responsibility. In that case the consignee was insolvent.

The lower Court held that, although the language was the same, the obligation of the consignor in an order bill of lading to pay freight charges, if the consignee did not, was different than in a straight bill of lading. In the course of the opinion the Court of Appeals said:

"The respondent states that he has been able to find only two cases sustaining defendant's contention that the railroad company under the circumstances here stated cannot recover the freight charges of the consignor. (Louisville & Nashville R. R. Co. v. Central Iron & Coal Co. 284 Fed. 250 [the case at bar]; Yazoo & M. V. Ry. Co. v. Zemurray, 238 Fed. 789.) These authorities proceeded upon the theory that the railroad company had made an election to collect from the consignee or notify party and that it could not thereafter claim transportation charges from the consignor. Counsel for the respondent very frankly concedes that this reasoning is untenable but insists that the basis for the decision should have been the contract obligation which the railroad

company assumed by the order bill of lading to collect the charges from the notify party."

"Under the order bill of lading, the railroad will only deliver upon the production of the original bill of lading, which indicates that the purchase price has been paid. The rule as to freight charges, however, remains the same in both cases. *The railroad company may demand the amount from the consignee or it may collect from the consignor. It cannot make an election nor be held to an estoppel without violating the purpose and spirit of the Interstate Commerce Commission Act. In order to prevent preferences, it is obliged to collect its freight charges and if it cannot get them from one party it must look to the other. Delivery of the goods without collection is no release or waiver of any or either party.* This we held in the *Ross Lumber Co. case (supra)*, and such is the decision in *New York Central R. R. Co. v. Philadelphia & Reading C. & I. Co.* 286 Ill. 267; *B. & M. R. R. Co. v. National Orange Co.* 232 Mass. 351; *Montpelier & Wells River R. R. Co. v. Bianchi & Sons*, 113 Atl. 534; *N. Y. N. H. & H. R. R. Co. v. Tonella*, 79 N. H. 464; *Great Northern Ry. Co. v. Hocking Valley Fire Clay Co.* 166 Wis. 465; *C. & N. W. Ry. Co. v. Queenan*, 102 Neb. 391; *Wells Fargo & Co. v. Cuneo*, 241 Fed. 727."

This quotation not only shows that other Courts are not impressed by the decision of the Circuit Court of Appeals in the instant case, but how contrary to the decisions of other Courts it is.

Another comparatively recent decision in point is *C. C. C. & St. L. Ry. Co. v. Southern Coal & Coke Co.* 147 Tenn. 433; 248 S. W. 297.

The Court exhaustively reviews the decisions and concludes as follows:

"We find two cases that, in a measure, take a contrary view. In the case of *Y. & M. V. Railroad Co. v. Zemurray*, 238 Fed. 789; 151 C. C. A. 639, the

holding of the court is contained in the headnote as follows:

'Though the carrier can, notwithstanding the usual clause of the bill of lading as to delivery to the consignees on payment of the freight, and regardless of the ownership of the goods, waive its lien and recover the freight from the consignor, where the carrier attempted to collect from the consignee, but through error collected only part of the amount due, and could thereafter have collected the balance from the consignee who owned the goods, from other goods in his possession, it will be bound by its election to collect from the consignee and not permitted to sue the consignor for the balance.'

The other case is that of *Western Railway of Alabama v. Collins*, 201 Ala. 455; 78 South. 833. Collins assigned (consigned) goods at New Orleans to himself in Alabama. He attached a draft for the goods to bill of lading with direction to notify one Scott. Scott paid the draft and thereby procured the bill of lading. He then went to the railroad and paid the freight demanded and secured the goods. A mistake was made by the agent of the railroad in not collecting enough freight, and suit was instituted against Collins to collect the balance thereof. The court denied a recovery and said:

'It chose to collect the charges from Scott, who was the then owner of the goods. Having so chosen, and collected a part from him, it must from him collect all. It is true that there is no question of estoppel, by its collecting a part of the charges only and delivering the goods to Scott, who was then the owner; but there is the question of fair dealing, which does and ought to control.'

The court concluded its opinion as follows:

'It is true this is not, strictly speaking, a case of election, but is one of fair dealing, to promote justice between all the parties.'

The decision in the *Zemurray* case recognized the general rule of continued liability on the part of the consignor for the freight charges, but made an exception, based upon the idea that the consignee, who was the owner of the goods, had other property out of which the freight charges could have been collected.

In the Collins case, which was decided upon the authority of the Zemurray case, the court also recognized the general rule of continued liability of the consignor for the freight charges, but made an exception based upon the doctrine of 'fair dealing.' In both cases it is inferable from the records that the consignees were solvent and had accepted the goods, which distinguishes those cases from the one under consideration.

In our opinion, upon the authorities hereinabove referred to, the consignor can only be relieved from liability by paying the freight except where the statute of limitations has intervened, and this is undoubtedly true where the consignee is insolvent."

In *N. Y. N. H. & H. R. R. Co. v. Tonella*, 79 N. H. 464; 111 Atl. 341, the Court said:

"If the decision in *Yazoo, etc. Railroad v. Zemurray*, 238 Fed. 789; 151 C. C. A. 639, cited by the defendant, is opposed to this result, it is contrary to the principles of most of the authorities and cannot be followed."

Wells Fargo & Co. v. Cuneo (D. C.), 241 Fed. 727, was an action against a consignor for an undercharge. In sustaining a demurrer to a separate defense the Court said:

"Briefly summarized, this defense sets forth that the shipment was 'delivered by the defendant and accepted by the plaintiff under a lawful agreement that the plaintiff would collect its lawful charges for transporting the same from the consignees thereof and from no other person.' This defense cannot avail defendant under *Atlas S. S. Co. v. Columbian Land Co.* 102 Fed. 358; 42 C. C. A. 398; *Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co.* 130 Fed. 860, 65 C. C. A. 344; *Jobbitt v. Goundry*, 29 Barb. (N. Y.) 509; *Central Railroad of New Jersey v. MacCartney*, 68 N. J. Law, 165, 52 Atl. 575; and other cases unnecessary to cite.

'The rule is that the consignor is the party primarily liable for the payment of the freight, and this rule is enforced, independent of the question whether the consignor is the owner, and regardless

of the question whether the payment of freight is secured by a lien on the cargo, because the consignor is the party for whom the service is performed.' *Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co. supra.*

It is urged, however, that the defense is good because, *inter alia*, the complaint alleges merely that the consignee has refused to pay, and does not allege that the charges cannot be collected from the consignee. This refusal, if anything, makes the plaintiff's case stronger. It was the duty of plaintiff, as a carrier in interstate commerce, to collect the charges, and, if the consignee will not pay, plaintiff is not called upon to sue the consignee, but may look to the shipper."

The question was discussed in *Boise Commercial Club v. Adams Express Co.* 17 I. C. C. 115, 121, and it was there said:

"It is a carrier's right as a public service corporation to demand prepayment on all shipments, and it may not distinguish between persons who pay in advance and those who do not. The carrier may waive its right to demand prepayment and accept a shipment with the understanding that it will collect the charges upon delivery to consignee; but if it does not collect such charges from the consignee it must look to the consignor for payment. The collection of the lawful rate is a duty imposed upon the carrier by law, and it is given a lien upon the property transported to enforce the payment of charges. To accept a shipment without prepayment is no more than to extend credit to the consignor, and this within reason and nondiscriminatory limits it may do."

Equitable estoppel through giving credit to consignee and not giving notice to shipper that charges were in arrears is no defense to an action against the shipper.

B. & M. R. Co. v. National Orange Co. 232 Mass. 351, 122 N. E. 313.

Acceptance and renewal of a note, which was never

paid, given by consignee for freight charges is no defense.

Great Northern R. Co. v. Hocking Valley Fire Clay Co. 166 Wis. 465, 166 N. W. 41.

Custom that charges would be collected from consignee is no defense.

C. I. & L. Ry. v. Peterson, 168 Wis. 193; 169 N. W. 558.

"It was the shipper * * * who engaged the services of the appellant (initial carrier) and who became liable for the charges in the first instance. Such liability could only be discharged by payment."

B. & O. S. W. Ry. Co. v. New Albany Box & Basket Co. 48 Ind. App. 647; 94 N. E. 906, 908.

"The situation of the railroad is not unlike that of a public tax collector. If a tax is not paid, a tax warrant must issue, and the processes of law must be set in motion one after another so long as there is the slightest chance to collect. Whether the shipper or the consignee is primarily liable between themselves for the freight charges is no concern of the railway company. Since the shipper is the person who deals with the railway company and the one who induces the carrier to perform the transportation service, he is liable absolutely."

Atchison, T. & S. F. Ry. Co. v. Stannard & Co. 99 Kans. 720; 162 Pac. 1176.

"So far as the carrier is concerned, the consignee is regarded as the agent of the shipper, to pay the freight; and if he fails to pay, the consignor must take the consequences."

Jelks v. Phila. & Reading Ry. Co. 14 Ga. App. 96; 80 S. E. 216.

To the same effect are:

Montpelier & W. R. R. Co. v. Chas. Bianchi & Sons, _____ Vt. _____, 113 Atl. 534.

Northern Pac. Ry. Co. v. Pleasant River Granite Co. 116 Me. 496; 102 Atl. 298.

Coal & Coke Co. v. Buckhannon River Coal & Coke Co. 77 W. Va. 309, 87 S. E. 376.

Bush v. Keystone Driller Co. 199 Mo. App. 152, 199 S. W. 597.

Yazoo & M. V. R. Co. v. Picher Lead Co. Mo., 190 S. W. 387.

Waters v. Pfister & Vogel Leather Co. 176 Wis. 16, 186 N. W. 173.

Southern Ry. v. Southern Cotton Oil Co. 19 Ga. App. 453, 91 S. E. 876.

It is true that in practically all of the above cases there was no dispute but that the consignee was insolvent because it is not the practice to collect undercharges from consignors when there is any reasonable prospect of making collection from the consignee. Suit was brought in this case only because it appeared impossible to obtain payment from the consignee.

But all the cases referred to were decided on the ground that there was, and must be, to enforce the Interstate Commerce Act, an absolute liability on the part of the consignor to pay if the consignee does not.

We have not cited or quoted from all such cases, but have attempted to show that the overwhelming weight of authority is contrary to the decision of the Circuit Court of Appeals, and also to show the reasoning upon which such opposite conclusions have been so uniformly reached.

The consignee was not solvent when this suit was brought except in the sense that one may be said to be solvent until adjudged otherwise.

The Circuit Court of Appeals in its opinion said:

"The evidence authorized a finding that the con-

signee remained solvent until after the present suit was filed. * * *

Both parties having requested the court to direct a verdict, the action of the court will not be disturbed, if there was any evidence to support the verdict directed. *Beuttell v. Magone*, 157 U. S. 154, 157, 15 Sup. Ct. 566, 39 L. Ed. 654."

No such finding was made by either the Court or jury below, but the jury was given the following instruction:

"I charge you gentlemen of the jury, that if you believe all the evidence in this case, you must find your verdict for the defendant." (Trans., 125.)

Plaintiff in error's contention is and at all times has been that it was immaterial whether the consignee was solvent or not, although in order to secure, if possible, a judgment in the District Court for the amount due, in spite of the *Zemurray* case, evidence touching on the consignee's solvency was introduced.

However, by arguing that the evidence did not authorize a finding of solvency we do not wish to be understood as conceding that solvency could affect liability, because we think that that would be contrary to law and to the requirements of the Interstate Commerce Act.

We fully realize the weight which will be given by this Court to the statement made by the Circuit Court of Appeals, but we contend that that statement is not supported by any substantial evidence.

The evidence on this point is detailed in our statement but, briefly stated, such a finding would rest only on the evidence of the ex-vice president of the Smelters Corporation who testified that if at any time up until April 15, 1920, when default in payment of bond interest was made, the Railway Company had had an execution for the amount sued for, the same could have been collected from the Smelters Corporation because it had some

money, which was not covered by the mortgages, on deposit in a bank. This suit was begun in January, 1920.

As opposed to this, it is undisputed that the property covered by the \$250,000 mortgage was sold at foreclosure sale in November, 1920, and bid in by the mortgagee for about one-half the amount of the mortgage; that the Smelters Corporation only operated its plant for two or three months in the early part of 1917, after which it was shut down and placed in charge of watchmen, and that there was a chattel mortgage of \$1,600 on the tools in the shop.

Bank records are not open to the public, but mortgage records are. If a collector for either a railroad company or any commercial concern had a bill for \$3,000 to collect from a manufacturing company, and upon investigation he found that it had not operated for about three years and never operated except for about three months; if upon going to its factory he found only watchmen there; and if upon going to the public records he found a mortgage for more than the plant was worth and even a chattel mortgage on the tools in the shop, he certainly would be justified in reporting the debt as worthless; and the company to which it was due would be justified in trying to collect from any other party liable.

Clearly, when the Circuit Court of Appeals held this company was solvent, it used the term in an extremely technical sense; and if the rule is that collection cannot be made from a consignor if the consignee is technically solvent at the time the suit is brought, then, assuming that compliance with the act requires payment, many cases will arise in which the requirements of the Act can never be met.

To hold that the consignor was not liable for an under-charge when part of the charges had been collected from the consignee, if the latter is solvent when suit is brought, leaving to the determination of a court or jury the question of the consignee's solvency, would defeat the requirements of the Interstate Commerce Act.

The word "solvent" has been defined in various ways under various circumstances, but if the solvency of a consignee is to be a test of the consignor's liability for interstate freight charges, the scope of the inquiry should not be limited as to time and it should conclusively appear that the railroad could have made collection from the consignee if it had sued him instead of the consignor. It would scarcely be contended that the possibility of collection would be sufficient. It is true that, when the existence of a condition or state of things of a continuing nature is once shown, such condition or state is presumed to continue to exist until the contrary is shown. In this case it was shown that the consignee became insolvent before the trial and about three months after the suit was brought.

Proof of the existence of a debtor, who is not insolvent, is merely showing that he *may* pay or *may* be forced to pay, not that he *will* pay or that he *can* be forced to pay. It is plain that if it be permitted to substitute presumption for payment, many bills will only presumably be paid, whereas it takes actual payment to satisfy the law.

The present suit was begun in January, 1920, but was not concluded until October, 1921, almost two years later. If, instead of bringing the suit against the consignor, suit had been brought against the consignee, it is substantially certain that such action would have been as ineffectual in securing payment, as has been the result

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in this case so far, because, while, theoretically, it should be otherwise, yet the facts are that judgments are entered and executions issued in only a very few cases within three months, and many concerns, which are solvent when suits are instituted, become insolvent or disappear by the time final judgment is rendered.

If proof of the solvency of the consignee can be relied upon, such proof ordinarily would have to be made by some employee or agent of the consignee unless, as in the instant case, the consignee and its property had disappeared and the testimony of some ex-officer or ex-employee were relied upon.

Bearing in mind, then, that this Court has held that the consignee is liable for an undercharge and is required by the Interstate Commerce Act to pay the same, and bearing in mind the further fact that a consignor represents to the carrier that the consignee will take the goods and pay the lawful charges thereon, can it be that the Courts will permit a consignor to escape liability by the testimony of the consignee that he could pay the charges but would not,—that he was deliberately violating the law? If the consignee's insolvency must be established before the consignor is held liable, then failure to pay should be held to be a conclusive presumption that a consignee is insolvent.

Moreover, the finding of a Court or jury, far removed from the consignee's residence, and without power over him, would have little bearing on what a sheriff with an execution might find or realize. The only proper test is whether the consignee has made payment. If a carrier must prosecute claims to judgment and execution against the consignee, and show a return of *nulla bona*, lapse of time in many instances would bar its remedy against the consignor.

CONCLUSION.

While it is true that this Court has not held that a consignor must pay an undercharge if the consignee does not, yet that would seem to follow from the principles it has laid down in the cases we have cited, dealing with the liability of a consignee.

That also has been the conclusion reached by numerous State Courts and is the rule which has been generally applied by the Federal Courts except in the Fifth Circuit.

To make any exception, based upon a finding by the trial Court of facts with reference to the liability or financial condition of parties not before the Court, would be open to the same objection which has been advanced against submitting the question of the reasonableness of a rate to Courts and juries; namely, that on the same state of facts different conclusions would be arrived at.

It is true that if the consignor be required to pay when a consignee, who has agreed with the consignor to pay becomes insolvent, an actual hardship will be imposed on the consignor; but any other rule would be contrary to the spirit and purpose of the Interstate Commerce Act.

To require the consignor to pay when the consignee is not insolvent would impose a nominal hardship; but if the rule is otherwise, as is well illustrated by the facts in this case, a way will be opened up whereby a carrier will be precluded from collecting its lawful charges on the theory that a consignee who has not paid can be or could be compelled to pay, when it is undisputed that he became insolvent before the case was tried and when it is extremely doubtful whether collection could have been made had he been sued instead of the consignor.

Unless, so far as the carrier is concerned, the consignee

be regarded as the agent of the shipper to pay the freight and his defense is limited to proving payment, discrimination is bound to result.

The judgment should, therefore, be reversed and the cause remanded.

Respectfully submitted,

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WM. A. STANS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 198.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY,

Plaintiff in Error,

vs.

CENTRAL IRON & COAL COMPANY,

Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT
IN ERROR.

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IN THE
**SUPREME COURT OF THE UNITED
STATES**

OCTOBER TERM, 1923.

No. 198.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY,

Plaintiff in Error,

vs.

CENTRAL IRON & COAL COMPANY,

Defendant in Error.

BRIEF AND ARGUMENT FOR DEFENDANT
IN ERROR.

STATEMENT OF THE CASE.

The statement of the case contained in the brief of counsel for the plaintiff in error is, (except in the one particular hereinafter pointed out) in the main, correct, though not in all respects accurate, nor is it complete.

In the first place, we desire to call the special and careful attention of the court to the form of the bills of lading involved in this suit. These bills of lading have been treated throughout, by counsel for plaintiff in error, as well as by the District Court and the Circuit Court of Appeals, as the ordinary "ORDER" bill of lading, or, as it is commonly called "ORDER NOTIFY"

bill of lading. It is true that the printed form employed is that of the ordinary "ORDER" or "ORDER NOTIFY" bill of lading; but in their completed form, after they had been filled out, they differ in one, and we think an essential, respect from the ordinary "ORDER" or "ORDER NOTIFY" bill of lading, as found in its completed form after execution.

This difference consists in the fact that in the ordinary familiar case, besides the carrier, there appear in the bill of lading, two parties, one of these being both the consignor and also the consignee, and the other being the party to be notified. The use and employment of this form of bill of lading is frequent and familiar, and its substance and meaning are well known to and understood by both carriers, shippers and receivers of goods, as well as to the courts. This substance and meaning are, that the consignor is the owner of the goods; that he has contracted to sell them to the person to be "Notified"; that the purchase price has not been paid, and that the goods are not to be delivered to the purchaser until the purchase price has been paid; and that this is accomplished by the seller consigning goods to himself at the residence of the purchaser, or the place of delivery, taking a bill of lading which is transferable by the endorsement of the consignee, under which the goods will not be delivered except upon the surrender of the bill of lading, endorsed by the consignee, endorsing the bill of lading, and forwarding it to a bank at the residence of the purchaser, or place of delivery, attached to a draft drawn on the purchaser; and the bill of lading so endorsed, is to be delivered to the purchaser upon payment by him of the draft on him for the purchase price;

and then, upon surrender by him to the carrier of the bill of lading, so endorsed, the carrier will deliver the goods to him.

It will be observed that in the bills of lading here involved, Tutwiler & Brooks are the consignees, and Great Western Smelters Corporation is the party to be "Notified"; but instead of the bill of lading reciting that the goods were received from Tutwiler & Brooks, as is usual, it recites that they were received from Central Iron & Coal Company.

In the transaction evidenced by this "Order" or "Order Notify" bill of lading, there is room, besides the carrier, for only two parties, viz:- the seller, and the purchaser, of the goods in question, and no room, necessity, or field of operation for a third party; and not only is it shown by the testimony, and without objection on the part of the plaintiff in error, that the coke here in question was the property of Tutwiler & Brooks at the time it was delivered to the initial carrier, and that the defendant in error had, at and subsequent to that time, in the coke, no title, claim or interest of any kind, or any control whatever over it (See testimony of H. M. Brooks, Tr. pp. 94 and 95), but the very form and frame of the bills of lading themselves clearly showed that to be the case. After these bills of lading were issued, the plaintiff in error had, over the coke, no control whatever. It could not have diverted it in any way, either by changing its destination or substituting for Tutwiler & Brooks another consignee, as can the consignor in an ordinary straight bill of lading, or the owner of the goods (usually both consignor and consignee) in a "NOTIFY" or "ORDER NOTIFY" bill of lading.

Therefore, the bills of lading here involved are different from that involved in any case cited on the brief of counsel for plaintiff in error, and different from that involved in any case which has come before the court, so far as we have been able to find.

In the bills of lading here involved, Central Iron & Coal Company, defendant in error, is not, in substance and effect, the consignor of the coke in question, and is not to be so treated. Its position and relation in reference to the coke in question is at least one degree removed, or more remote, than that of the consignor in the bill of lading in any case heretofore before the court.

While the Circuit Court of Appeals, in its opinion, styled the defendant in error as consignor, it apprehended its true relation to the transaction, and treated it accordingly; but strictly and properly speaking, Central Iron & Coal Company was not, in the true, technical sense, the consignor.

We beg the court to carefully examine the bill of lading found in the record, (Tr. pp. 50-59) to carefully consider the view here expressed, and to approach the consideration of this case with that view of the matter in mind.

In reference to the finding by both the District Court and by the Circuit Court of Appeals, that Great Western Smelters Corporation remained solvent until January 8, 1920, and the references in the statement of the case contained in the brief of counsel for plaintiff in error to portions of the testimony on this point, we beg to draw the attention of the court to the following:

The Circuit Court of Appeals did not "find that

Great Western Smelters Corporation remained solvent until January 8th, 1920"; but found that "the evidence authorized such a finding by the District Court"; and after reciting the substance of defendant's Plea No. 12, stated "there was evidence introduced sufficient to sustain said plea." In this the Circuit Court of Appeals was correct, as appears from the following portions of the testimony of Mr. Charles Batre: —True, Mr. Batre testified on page 118 of the transcript "We discontinued operations about the first of June, 1917"; but by "discontinuing operations," he evidently meant only the actual work of smelting ores; and not that the company then discontinued or retired from business; because on page 122, he states "Great Western Smelters Corporation discontinued operations of its plant at Mayer, Arizona, in July, 1918. When operations were discontinued, the company paid all taxes, interest on its bonds, and retained the property in its possession and kept two watchmen. I was left at Mayer, Arizona, after the discontinuance of operation, and had authority to pay any claims against the company, and transact any business for the company." And on page 120 he testified "Great Western Smelters Corporation had no indebtedness"; and on page 121, "Great Western Smelters Corporation made no default in the payment of any principal or interest secured by the mortgage above mentioned. All current bills of every kind of Great Western Smelters Corporation were paid"; and it is evident that no default in the payment of interest on the bonded indebtedness of this company was made until April 15, 1920; and then, by Big Ledge Copper Company, which had succeeded to the rights of Great Western Smelters Corporation,

by the purchase of either its capital stock or its assets, the exact character of the transaction not being shown. It will be borne in mind that these bonds of Great Western Smelters Corporation ran for ten years from the date of their issue (Tr. p. 123), and while the exact date of their issue is not shown, it could not have been prior to October, 1916, because it was not until the last mentioned date that the company was incorporated (Tr. p. 114). Therefore, while the defendant's plea Number 12 avers that this alleged undercharge could have been collected from Great Western Smelters Corporation up to the date of the institution of this suit, viz: January 8th, 1920, the testimony shows that Great Western Smelters Corporation made no default in the payment of any obligation of any kind, until April 15th, 1920; and even then, it only became in default in the payment of the interest on its bonded indebtedness; and the mortgage or deed of trust on the property was not foreclosed until November, 1920, and it was a going concern until the foreclosure sale——. Mr. Batre testifies on page 115 of the Transcript, "I was actively engaged in the management of the business until May, 1919, and personally paid the taxes and interest on the bonded indebtedness up to and including April 15th, 1920"; and on page 121 he testifies "During the month of April, 1917, and from that time until April 15, 1920, Great Western Smelters Corporation was able to pay, and if it had declined to pay, could have been forced to pay an indebtedness of \$3,463.46, if it had been shown to be liable therefor, or to have owed the same"; and further, on page 121 "during this same period Great

Western Smelters Corporation would have been good for an execution in the sum of \$3,463.46."

In reference to the date at which this undercharge was brought to the attention of Great Western Smelters Corporation;— Mr. Batre testified on page 122 of the Transcript that the matter was never brought to the attention of his company, or of any of its officers or agents, until June, 1921, a year and five months after the institution of this suit; and when he says on pp. 123 and 124 of the Transcript "The Great Western Smelters Corporation had, at Mayer, Arizona, at the time the alleged undercharge in freight was discovered, no property other than that which was covered by mortgages or other liens," he evidently refers to the month of June, 1921, the time at which it was brought to his attention; and it is true, as stated in the opinion of the Circuit Court of Appeals, "For nearly three years, the matter rested in this condition. No sufficient reason for the failure to ascertain the facts and to proceed against the consignee is shown." The Circuit Court of Appeals, in employing in this connection, the term "consignee," evidently refers to Great Western Smelters Corporation; but we beg to add that neither is any sufficient reason shown for the failure by the plaintiff in error to proceed against Tutwiler & Brooks, who are shown without controversy to have been the owners of the goods at the time they were delivered to the carrier, during their transportation, at the time of their arrival at Mayer, Arizona, and thereafter, up to the time Great Western Smelters Corporation paid the draft and received the bills of lading endorsed by Tutwiler & Brooks; were the persons for and to whom the service of transportation was

rendered; and, while not so expressly designated in the bill of lading, were, in fact and in substance, the consignors; all of which sufficiently appears both from the oral testimony of Mr. Brooks, shown on pp. 94 and 95 of the Transcript, and, when properly read and considered, from the framing of the bills of lading themselves.

The court will observe that, while this was not the subject of any adjudication by the Circuit Court of Appeals, for the reason that the learned Judge of the District Court sustained demurrers to the pleas in which this defense was set up, yet the defendant in error took, in the District Court, the position that it was not, in substance and effect, the consignor, but that Tutwiler & Brooks, (being the consignees in these "Order," or "Order Notify" bills of lading), were, by the terms of the bills of lading themselves, and, as a matter of fact and substance, the owners and consignors of the goods.

This defense was set up in the defendant's pleas 3, 4, 5, 6, 7, 8, 9, 10, 11, 5A, 6A, 7A, 8A, 9A, 10A, and 11A; and in pleas 8A, 9A, 10A, and 11A, the defendant set up the fact that this undercharge could have been collected from Tutwiler & Brooks at any time up to the institution of the suit, just as it set up in its plea No. 12 that it could have been collected from Great Western Smelters Corporation; though this did not become an issue in the case, for the reason that the District Court sustained the plaintiff's demurrers to these pleas.

We now beg to draw the attention of the court to, and to correct the error in reference to the facts of the

case, contained in the brief of counsel for plaintiff in error, to which we referred in the early part of this statement.

While not found in that portion of the brief designated "Statement of The Case," but on page 16 of the brief, in the argument submitted in support of their second proposition of law, yet it is, in effect, a part of their statement of the case. The statement referred to is the following:-

"It is undisputed that demand was made on the consignor before suit was brought and that the consignor had a contract for the sale of the coke f. o. b. Holt, Alabama, to the firm of Tutwiler & Brooks of Birmingham, Alabama, the bill of lading consignee.

Instead of paying the undercharge and making collection from either Tutwiler & Brooks or the Smelter Corporation, the consignor, so far as the record shows, did nothing before, or for over fifteen months after, the suit was brought, when it filed a demurrer to the complaint."

See p. 16 of Brief of Counsel for Plaintiff in Error.

This is an error; committed, doubtless, through oversight of counsel.

There is not in this record, nor was there in the District Court, a syllable of testimony, directly or remotely in reference to any demand made upon the defendant in error by either the plaintiff in error or any one else, for the payment of this undercharge, or of any sum on account thereof, or any communication whatsoever in reference to it.

SPECIFICATION OF ERRORS RELIED UPON BY PLAINTIFF IN ERROR.

We respectfully submit that not one of the specifications of error made by plaintiff in error is well taken, and that there is no error in any ruling made by the Circuit Court of Appeals in the case.

The first specification of error is not well taken:- First, for the reason that the consignor in a bill of lading is not the party primarily liable for the freight or carrying charges on goods, but the consignee is the party primarily liable; and, Second, for the reason that the defendant in error is not, in substance and effect, the consignor in the bills of lading in question, nor was it the owner of this coke, nor was it the party for or to whom the service of transportation was rendered.

The second, sixth and seventh specifications of error involve substantially the same point, in neither of which was there error on the part of the Circuit Court of Appeals.

The third specification of error is not well taken:- The evidence did authorize a finding by the trial court that Great Western Smelters Corporation, referred to as consignee, remained solvent until after the present suit was filed; nor was there error in holding that, under all of the circumstances disclosed by all of the testimony, the defendant in error was not liable for the undercharge in question.

The fourth specification of error is not well taken:- The Circuit Court of Appeals made no specific finding or holding in the exact terms of this fourth specification; but simply that under the circumstances of this case, the defendant is not liable; and this hold-

ing and ruling of the Circuit Court of Appeals is correct, and may be justified, not only upon the grounds stated in the opinion of that court, but also upon other grounds; among them, that the defendant in error did not bear to the coke in question, or to the plaintiff in error, such relation as renders it liable for this undercharge.

The fifth specification of error is not well taken:- Not only was the ruling of the District Court in overruling plaintiff's demurrer to defendant's plea Number 12 free from error; but the District Court erred in sustaining plaintiff's demurrers to defendant's pleas Numbers 3, 4, 5, 6, 7, 8, 9, 10, 11, 5A, 6A, 7A, 8A, 9A, 10A, and 11A; each and all of which set up a good, valid, sufficient defense to the plaintiff's action.

The second, sixth and seventh assignments of error are not well taken, for the reason that, under all of the evidence in the case, the defendant was entitled to a verdict.

BRIEF AND ARGUMENT.

I.

In reference to the two legal Propositions I and II, stated on pp. 8 and 13, respectively, of brief of counsel for plaintiff in error:- We respectfully submit that neither of them is sound, and neither is supported by either reason or authority.

These statements announce the proposition that in the shipment of goods over a common carrier, the consignor in the bill of lading issued for the goods, is primarily liable for the freight or carrying charges.

It is familiar that there are to be found in the books some authority, or what seems, upon a casual view, to be some authority, for almost any proposition of law which may be announced; and so in this instance. The cases cited in the brief of counsel for plaintiff in error do contain the statements extracted therefrom and quoted in the brief. But this falls far short of establishing the correctness and soundness of the proposition under consideration. The truth is, the law is exactly the contrary; and it is the consignee, and not the consignor, who is primarily liable for the payment of freight or carrying charges on goods transported by a common carrier for hire.

It would seem to be unnecessary to go further than to cite the case of *Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Company vs. Alvin J. Fink*, 250 U. S. 577, (63 L. Ed. 1151), decided by this court as recently as November, 1919; in which this court, speaking through Mr. Justice Day, states, "The weight of authority seems to be that the consignee is prima facie liable for the payment of the freight charges when he accepts the goods from the carrier." But, as stated by this court in the opinion in that case, this view is well supported by the great weight of authority. The authorities cited in that opinion in support of this position are plain and clear to that point.

In the citation made in this opinion in 63 L. Ed., (the volume to which we have had access) there is an error in the statement of the section of *Hutchinson on Carriers* to which reference is made. That reference is to *Hutchinson on Carriers*, 3rd Ed. Sec. 1559. The section of *Hutchinson on Carriers* to which the court intended to refer, is evidently Sec. 807, pp. 897 and

898, which is exactly in point; and 1559 is the section of Elliott on Railroads which announces exactly the same rule. This rule is stated by these two authors in the following language:-

"Sec. 807 (Sect. 448) WHO LIABLE FOR THE FREIGHT—CONSIGNEE PRIMA FACIE LIABLE.—

The consignee is presumptively the owner of the goods, and is therefore prima facie liable for the freight, and if he accepts them, the law implies a promise on his part to pay it; and such acceptance is evidence from which a jury must infer that he is the owner, and therefore bound by an implied contract to pay the freight upon them, unless such inference would be inconsistent with other facts of the case or with proof of ownership in another; and although he be not named as consignee in the bill of lading, if he be the party for whom the goods were intended, he becomes liable for the freight as soon as they are accepted by him. But if he is not the owner, he does not become liable from the mere fact of his being consignee, and no contract to pay the freight can be implied unless he accepts the goods; nor even then where the consignee is known to be merely the agent of the shipper, will the law imply a promise on the part of the agent to pay the freight, though from all the circumstances of the case the jury may find that there was an implied promise. Such contract may also be implied from the previous course of dealing between the parties, as where the consignee had always previously paid the freight upon the goods delivered to him by the carrier under the same circumstances.

But the mere acceptance and removal of the goods by the consignee, with knowledge that the car-

rier is giving up for his benefit a lien upon the goods for a stated amount, does not create an obligation on the part of the consignee to pay charges beyond the amount stated."

2 Hutchinson on Carriers, (3rd Ed.) Sec. No. 807, pp. 897-898.

And in Elliott on Railroads the same rule is stated in the following language:-

"Sec. 1559. WHO IS LIABLE FOR FREIGHT CHARGES.— In the absence of anything to the contrary, the consignee is presumed to be the owner of goods shipped to him and is *prima facie* liable for the freight, so that if he accepts them the law implies a promise on his part to pay it. The rule which prevails in England and in most jurisdictions in this country is thus stated in a well known text-book: "The contract for carriages is, in the absence of any express agreement, presumed to be between the carrier and the person at whose risk the goods are carried, i. e., the person whose they are, and who would suffer if the goods were lost. * * * * * When, therefore, goods are sent to a person who has purchased them, or are shipped under a bill of lading by a person's order and on his account, the consignee, as being the person at whose risk the goods are, is considered the person with whom the contract is made. He is liable to pay for the carriage and is the proper person to sue the carrier for a breach of contract." (Citing Dicey Parties to Actions, 87). But the presumption that the consignee is the owner and liable for the freight is rebuttable, and if he is not the owner and refuses to accept the goods no promise on his part to pay the freight can be implied

from the mere fact that they are consigned to him. So, much may depend upon the contract showing the intention of the parties in the particular instance. And if the consignee assigns the bill of lading before the goods are delivered to him, his indorsee, by accepting them, usually becomes liable, and the carrier, by delivering them to the latter, releases the consignee unless the indorsee received them as the consignee's agent. The carrier's remedy against the consignee, even where he might be held liable for the freight as owner of the goods, is not necessarily exclusive. If the shipper contracts in his own behalf it is but just to hold him liable, especially where the consignee refuses to accept the goods and pay the freight, and it has been held that the carrier is not obliged to collect the freight from the consignee even under a bill of lading containing the clause, 'he paying the freight thereon'."

4 Elliott on Railroads, Sec. 1559.

See also the case of *Mobile & Ohio R. Co. v. Laclede Lumber Co.* (Mo.) 216 S. W. 798, where it is stated:

"The consignee, and not the consignor is prima facie liable for the payment of undercharges of freight";

See also *Union Pacific R. Co. vs. American Smelting & Refining Co.*, 202 Fed. 720,

Sturges v. Det. G. H. & M. Ry. Co., (Mich.) 131 N. W. 706 (709);

King v. Van Slack, (Mich.) 159 N. W. 157.

Not only do the foregoing authorities establish the rule prevailing in this country to be that it is the consignee, and not the consignor, who is prima facie liable

for freight or carrying charges on goods shipped over a common carrier, which would be followed and applied notwithstanding there might be found some authorities to the contrary; but the authorities cited and quoted in the brief of counsel for plaintiff in error in support of their position, will, upon a careful examination, be found not to support the view contended for.

In the case of *Wooster vs. Tarr*, 8 Allen 270, (85 Am. Dec. 707), the first case cited on the brief of counsel for plaintiff in error on this point, and from which they quote at length, the mackerel constituting the shipment were purchased and paid for by the defendants for and on account of Howes & Company, at whose risk they were after shipment; but the statement of the facts of the case includes the statement that this fact was unknown to the plaintiffs; and the further statement that the mackerel were entered at the custom house in Halifax (the point from which they were shipped), **in the name of the defendants**. It, therefore, does not appear that the goods involved in this case were the property of the consignees, or that the service of transportation was rendered to them, or for their benefit; but rather the contrary.

These facts alone are sufficient to, and do, distinguish that case from the instant case. It is not stated that payment for the mackerel was made with funds of Howes & Company; and the stated facts are not inconsistent with the idea that the defendants had made a contract to sell and ship the mackerel to Howes & Company at Boston.

If this be true, the case bears no similarity to this. But if the case be not fairly susceptible of that view,

and if the facts be assumed to be that the mackerel, from the beginning, were the property of Howes & Company, and that throughout the transaction the defendants acted as agents for Howes & Company, the case is merely an instance of the simple and familiar case of an agent making, in his own name, a contract for an **undisclosed** principal, in which, of course, he binds himself to the party with whom he deals without disclosing the fact that he is acting as agent for another. While the other party may, upon discovering the fact of the principal's interest in the transaction, hold him, yet the agent has, of course, bound himself.

The case of *Blanchard vs. Page*, 8 Gray, 281, which counsel cite, and from which they freely quote on this subject, is not in point here. That was an action by a shipper against a carrier for damage to or loss of goods; and the question, and the only question involved in the case was, whether the plaintiff, consignor, was entitled to maintain the action; and the question of the primary liability, or any liability on the part of the consignor for the freight was referred to only incidentally, because of its supposed bearing on the main question in the case.

The opinion in this case is very voluminous, and contains a number of statements not necessary to the decision of the case, and they are, therefore, mere dicta, and have not the force of adjudications. The learned Judge who delivered the opinion himself stated:

"But though we have considered it important to establish the point that the original shipper and consignor is liable to pay

freight, because it establishes the privity of contract between these parties, and the mutuality of the contract, it is not the precise question in the present case."

We refrain from a detailed review of the opinion in that case; but a careful perusal of it will disclose the fact that in many of the cases cited therein, and from which the learned Judge drew his conclusions, the consignor was also the owner of the goods, or sustained to them some relation other than that growing out of the mere fact that he delivered the goods to the carrier for transportation by it. It will be observed that the learned Judge, in stating the proposition that a bill of lading constitutes a written contract between the ship-owner and the shipper, binding the ship-owner to the shipper to safely carry and deliver the goods, and the shipper to the ship-owner to pay the freight, pointedly states that this rule applies where the bill of lading is **"Without words showing that he acts in a representative capacity"**; and we may safely add to this exception or proviso the further statement **"Or the carrier is otherwise informed or put on notice that the person who delivers the goods to it for transportation is, in so doing, acting in a representative capacity, or for another."**

The court, in the course of the opinion in this case of Blanchard vs. Page, further observes:

"In the ordinary form of bill of lading, there is no expressed stipulation on the part of the shipper to pay freight, but his liability results from having engaged the ship-owner to take on board and carry the goods at his instance."

It is, therefore, clear that the ground on which the court based the statements found in *Blanchard vs. Page* is the assumption that the shipper contracts with the carrier to render to him, the shipper, the service of transporting the goods; and that it is neither shown by the bill of lading, nor otherwise brought to the knowledge of the carrier, that the service of transporting the goods is to be rendered to, or for the benefit of another. In the instant case, it was known to the carrier, both from the terms and form of the bills of lading themselves, as well as by facts and circumstances aliunde, that Tutwiler & Brooks were the owners of the coke in question; that they were selling it to Great Western Smelters Corporation; that the latter had contracted with the former to pay the freight, and was the party primarily liable therefor; that Tutwiler & Brooks were the owners of the coke at the time it was delivered to the carrier, during the transportation, and until the delivery to Great Western Smelters Corporation of the bills of lading endorsed by Tutwiler & Brooks; but the bills of lading disclosed no connection on the part of Central Iron & Coal Company with the transaction beyond the physical act of delivering the coke for and on account of Tutwiler & Brooks, to the carrier. The "Order" or "Order Notify" bill of lading is in general use, and the conditions and transactions to which it is adapted, and the cases in which it is used, are well known to all common carriers, and its meaning and import are known to be as above stated.

We submit that Central Iron & Coal Company's connection with this transaction is no more than that of a drayman, or a transfer company, who, under instructions from the owner of goods, delivers them to

a common carrier for transportation on account of and for the benefit of the owner.

Neither does the case of *Holt vs. Westcott*, 43 Me. 445, sustain the rule in support of which it is cited. In that case, while the opinion does contain a statement which, standing alone, might be construed as supporting the rule here invoked, yet it was pure dictum, for the reason that it was not necessary to a decision of the case, nor did the facts of that case call for or admit of the application of the statement; the fact being, as the Court there stated, that

"The inference from the testimony is that Westcott & Company were the owners of the cargo; that it was shipped for their benefit, and to fill their contract, and, therefore, they were liable."

In *Portland Flouring Mills Company vs. British & Foreign Marine Insurance Company*, 130 Fed. 860, the action was by the insurance company which had secured the carrier for the freight to be earned, and taken from the carrier an assignment of its claim for the freight (giving to it in the case the status of the carrier) to recover the freight on a cargo of flour shipped from Portland, a part consigned to Kobe, Japan, and the remainder to Hong Kong, China. The defendant in the action was the owner of the flour, and was shipping it to the respective destinations for sale there to certain firms named in the bills of lading as the "N'fy" or "Notify" party, the defendant being named as, and being in fact and in substance, both consignor and consignee; being at the time of the delivery to the carrier, and up to the time of the payment of drafts drawn

by it on the "Notify" parties, and the delivery to them of the bills of lading, the actual owner of the flour; and it took out on the flour policies of insurance in its own favor, securing it against loss in the total sum of the value of the flour **plus the freight.**

It is obvious that this case, in its essential facts, bears no analogy to the instant case. It is true that, after having arrived at a conclusion and decision of the case, based on its facts and the applicable rules of law, the court proceeded to make certain observations in reference to who is the party primarily liable for the freight or carrying charges on goods shipped, and states that this is the consignor, and cites and quotes from the case of *Wooster vs. Tarr*, *supra*; but what is there said on this subject must be taken in connection with the facts of that case, and it is evident that that court would never have made such observations in connection with the instant case. This is sufficiently clear from the following extract from the opinion in that case:

"We are of opinion that appellant, at the time the bill of lading was executed, must be considered as the owner as well as the shipper of the flour, upon the familiar and well-settled principle of law that, where goods are shipped by a vendor to a vendee, the vendor taking a bill of lading in which the vendor is named both as consignor and consignee, which bill of lading is endorsed in blank and attached to a draft for the purchase price drawn on the vendee, the title to the goods remains in the vendor, and the vendee does not become the owner of the same until the payment of the draft."

Section 810 of Hutchinson on Carriers, the next citation contained in the brief or counsel, is merely a general statement of general rules applicable to different circumstances, and follows almost immediately upon Section 807 of that work, cited by us above, in which it is distinctly stated that "The consignee is presumptively the owner of goods, and is, therefore, *prima facie* liable for the freight, etc."

7th English and American Encyclopedia of Law, 2nd. Ed. 260, the next citation on the brief of opposing counsel, is similar to that last above noticed; is general in its terms, and, taken as a whole, states the proposition both ways.

The next citation, Elliott on Railroads, Section 1659, is evidently a typographical error, and the section to which reference was intended is doubtless 1559, and was probably cited because the latter portion of the section in which the author states that the carrier's remedy against the consignee is not necessarily exclusive; but if the shipper contracts in his own behalf, it is but just to hold him liable, etc.

All of these statements in text-books are of general principles, and the text itself is chiefly valuable for its references to adjudicated cases; which are themselves valuable and enlightening only where the facts involved are analogous to those of the case under consideration; and the result of it all is that, in any given case, liability *vel non* depends upon the particular facts of the case under consideration.

As stated by Chief Justice Field of Massachusetts, in *Union Freight R. R. Co. vs. Winkley*, 159 Mass. 133 (38th Am. St. Rep. 398-402):

"But whether the presumption be one

way or the other is a matter of inference from the particular circumstances of the case, and the question which is always to be considered is, the understanding of the parties;"

and we think we may safely add, the situation of the parties and the circumstances attending the transaction.

In the case of *Barker vs. Havens* (17 Johnson 234) 8 Am. Dec. 393, where Chief Justice Spencer of New York held the consignor in that case liable for the freight, he adds:

"I should clearly be of opinion that if it appeared that the goods were not owned by the consignor, and were not shipped on his account and for his benefit, that the carrier would not be entitled to call on the consignor for freight, and I should incline to the opinion that in all cases the captain ought to endeavor to get the freight of the consignee."

This holding of Chief Justice Spencer is approved in *Holt vs. Westcott*, 43 Me. 449, cited by plaintiff in error.

See note to *Barker vs. Havens* 8th Am. Dec. 393 (395).

This situation and these circumstances, as well as the understanding of the parties, may be shown by parole testimony, so long as there is no contradiction or varying of the express terms of the writing. This is distinctly stated in the opinion in the case of *Blanchard vs. Page* cited and relied upon by plaintiff in error, as well as in the case of *Sturgess vs. Det. G. H. & M.*

Ry. Co. (Mich.) 131 N. W. 706; in *Wayland's, Adm'r. vs. Mosely* 5th Ala., 430; and numerous other familiar authorities.

As heretofore observed, these bills of lading themselves sufficiently show the relations of the several parties to the transaction here involved, viz:- that Tutwiler & Brooks were the owners, sellers and shippers of this coke; that Great Western Smelters Corporation, was the purchaser; and that Central Iron & Coal Company was nothing more than the agent or instrumentality through which Tutwiler & Brooks effected the delivery of the coke to the carrier for transportation to Great Western Smelters Corporation, their vendee. But if the bills of lading themselves left any question on this subject, certainly, the oral testimony of Mr. H. M. Brooks contained on pp. 94 and 95 of the Transcript sufficiently settles the question, and shows the situation to be as we have stated.

The second proposition stated in the brief of counsel for plaintiff in error assumes that their first proposition, to the effect that it is the shipper of goods who is primarily liable for freight, has been established. This subject has been discussed above and we will not pursue that discussion further.

In this second proposition the discussion is devoted mainly to the effect of the Interstate Commerce Act upon the liabilities of consignors of goods shipped over common carriers.

There seems to exist in some quarters a misapprehension of the purposes and spirit of the Interstate Commerce Act, and the length to which the courts

should, and will go in the furtherance and enforcement of the ends and purposes of the act.

The Interstate Commerce Commission, in Conference Ruling No. 314, has declared as follows:

"314. Collection of Undercharges.-

The law requires the carrier to collect, and the party legally responsible to pay the lawfully established rates without deviation therefrom. It follows that it is the duty of carriers to exhaust their legal remedies in order to collect undercharges from the party or parties legally responsible therefor. It is not for the Commission, however, to determine, in any case, which party, consignor or consignee, is legally liable for the undercharges, that being a question determinable only by a court having jurisdiction, and upon the facts of each case."

The impression seems to prevail on the part of some persons, that the matter of the collection of undercharges of freight is subject to none of the uncertainty which attends other human affairs; and that undercharges must, and will be collected in all events, and that if they can not be collected from someone who is legally liable for them, then they must be collected from someone who is not; as if a heathern god were offended with the nation, and it were necessary to propitiate his wrath by a sacrifice; or as if a crime had been committed, and the guilty party can not be apprehended, punishment must be administered to some innocent person, in order to satisfy the popular demand for vengeance.

The primary or main object and purpose of the

Act was not to aid common carriers in collecting, or to provide for them additional remedies or facilities for collecting transportation charges. It was not felt by the Congress that common carriers stood in need of any such assistance or facilities, being already sufficiently provided with them. While we would not be understood as expressing the view that the interests of common carriers should be, or that they have been, by this Act, disregarded or ignored; yet it is unquestionably true that the evils and abuses which the framers of this Act intended thereby to correct and prevent, were evils and abuses which were supposed to have been practised by the carriers themselves; and while we are aware that the law must be administered just as it stands, and that it is not the province of courts to make laws, yet, courts are not blind automats, but should and will, in construing, declaring and administering the law, permit free range of their sense of reason and justice, as well as to have in mind the circumstances which called for and induced the passage of an Act.

We understand the purpose of the Act to be to prevent unjust discrimination, either in favor of or against any shipper or class of shippers, and to secure like treatment to all, and that to the accomplishment of these ends, the full power of the courts will be applied.

We also recognize the many indirect methods to which shippers and carriers may resort in order to avoid the provisions of the Act, and that the Commission and the Courts are vigilant in tracing out, and rigid in dealing with such evasions, when discovered.

But we submit that it is possible to carry too far,

and to convert into an instrument of oppression, the very just and salutary provisions of the Act; and that this would be the plain effect of holding the defendant in error liable in this case.

In the construction and application of this Act, the Courts will have in mind and apply the general rules for the interpretation, application and enforcement of statutes. These are:- First, to ascertain what was the mischief or defect for which the law had not provided; that is, to call to the aid of the Court all those external or historical facts which are necessary for this purpose, and which led to the enactment. To refer to the history of the times, to ascertain the reason for, and the meaning of the provisions of the statute, and to the general state of opinion, public, judicial and legislative, at the time of the enactment.

Endlich on the Interpretation of Statutes, Sec. 29;
25 R. C. L., p. 1015- Sec. 254;
Smith vs. Townsend, 148 U. S., 490; 37 L. Ed. 533.

Second, a statute will not be so construed as to work injustice or hardship, if reasonably susceptible of a different construction.

25 R. C. L., P. 1022, Sec. 258;
Endlich on the Interpretation of Statutes, Sec. 258.

To deny the plaintiff in error recovery from the defendant in error of this undercharge cannot conceivably result in or encourage unjust discrimination, or have the slightest tendency in that direction.

We are further aware that there are many cases which have engaged the attention of the courts of the

country, including that of this august body, which in themselves involve negligible amounts, but most important principles, and were well worth the time and attention bestowed on them for the reason that the adjudications in which they resulted established principles important to the preservation and well being of society; and that of the interests affected thereby, those not actually involved in the case in question were far greater than those which were. That is to say, a decision involving a very small sum of money, and in that respect of small importance, may be of very great importance because of the general principles and public policy to be affected or influenced by it.

In this connection, we beg to suggest that while, at the time this suit was instituted, it might have been said to possess great importance, as involving a question which might afterwards be of very frequent occurrence, and that the adjudication one way or the other, of the questions here involved would settle important rights thereafter to arise, and that it might be stated on the part of the plaintiff in error that the decision in this case would be of importance for years to come because of its effect upon similar cases hereafter arising, and that it was necessary to establish the fact and principle that public policy demanded that undercharges of freight be always and invariably collected from one person or another; that the position of the plaintiff in error was in accordance with, and that of the defendant in error opposed to public policy, as viewed and declared by both the courts and the Interstate Commerce Commission, to the effect that no one in any way, however remotely, connected with the shipment and transportation of goods, should be per-

mitted to stipulate against liability for freight charges; it is now clear that this situation does not exist; but that it is now recognized by society generally, as represented by the Interstate Commerce Commission, and that it is not against, but entirely in accordance with fairness, justice and the policy of our Government, as represented by the Interstate Commerce Commission, to permit a stipulation that goods should be delivered to a consignee without recourse on the consignor for the carrying charges.

This is clearly evidenced by the fact that the Interstate Commerce Commission has either drafted or caused or permitted to be drafted, and has put in common use, a form of bill of lading containing this provision.

While it is impracticable to here set out the contents of this bill of lading, the following will, we trust, be sufficient reference to enable the Court to identify it and verify the correctness of our quotation from it:-

“Form 1030-1-(Revised 2-22)

Uniform Domestic Order Bill of Lading Adopted by Carriers in Official, Southern and Western Classification Territories, March 15, 1922.

Shipper's No.

UNIFORM ORDER BILL OF LADING.

(Prescribed by the Interstate Commerce Commission)”

This form of bill of lading will, upon inspection, be found to contain the following provision:-

“If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:-

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Sec. 7 of Conditions.)”

And Sec. 7 of Conditions is as follows:-

“Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading, that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection, it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.”

We submit that the drafting approval and distribution by the Interstate Commerce Commission of this bill of lading for use by carriers clearly indicates that the views expressed in the Zemurray case have met

with general approval, including that of the Interstate Commerce Commission; and that the position of the defendant in error in this case, (if it were in the true sense of the term, the consignor in the bills of lading in question, as we submit it is not) would not be against public policy or that of the Interstate Commerce Act.

In the first place, we must vigorously dissent from the first paragraph of this second proposition, viz: "That the old authorities were practically unanimous that a shipper who executed a bill of lading was liable for the freight charges, irrespective of whether or not he was the owner of the goods."

We cannot concede that the correctness of this provision has been established, but respectfully submit that it has not.

In the discussion of the cases cited in support of this second proposition, we concede that the Interstate Commerce Act has had some effect upon, and worked some changes in the law of common carriers.

We submit, however, that while this Act may have taken away or abolished some defenses which were, before the passage of the Act, available to consignors or consignees under certain circumstances, it has not had the effect of rendering liable for freight charges one who was not liable therefor before the passage of the Act.

We freely concede, that before the passage of the Act either a consignor or consignee might, in some cases, have successfully defended an action to recover an undercharge of freight upon the ground of estoppel, or election, or negligence on the part of the carrier, (as in the case of *Cent. R. Co. of N. J. vs. MacCartney*, 68 N. J. L. 165 (52 Atl. 575), and other similar cases)

and that since the passage of the Act, that defense, in the same case, may not be available to the defendant.

But we respectfully insist that this Act has not had the effect of repealing or abolishing all of the principles and rules of reasonableness, equity and justice; but that these principles are still embedded in the law of the land as before the passage of the Act.

We concede that the fact that it will work a hardship upon the defendant is not, in and of itself, a ground on which the courts will decline to enforce liability on the part of the consignor or consignee where liability otherwise clearly exists; but the law and the courts still abhor injustice, and will not hastily or inadvisedly proceed in the infliction of injustice one degree further than the inflexible provisions of the law require.

While it is the duty as well as the right of a common carrier to exhaust its remedies for the collection of undercharges of freight, we do not think that the law confers on common carriers the right to proceed, in such collection, arbitrarily or capriciously.

While we are not able to cite an express authority to the point, and while it is with a certain degree of hesitation and misgiving that we offer to this Court any rule for the construction and application of this Act which has not been already announced, yet we venture to suggest that it would be entirely reasonable and proper, and in perfect harmony with the spirit and purpose of the Act, to require carriers, in the absence of some fairly reasonable ground to the contrary, to proceed against parties in the order of their liability.

The rule that carriers must exhaust their legal remedies in order to collect undercharges was made

for the reason that a carrier who did not really desire to, but preferred not to collect an undercharge, could otherwise make some show or pretense of having made an honest effort to collect, without really having done so; and the practical effect of the rule is that a carrier, when brought before the Commission for its failure to collect an undercharge, cannot be exonerated by showing to the Commission that it has made demand, insisted upon the payment of, or brought suit against **someone** for the collection of an undercharge, when there was another party (perhaps a friend or business associate of the carrier), who was liable for the undercharge, but against whom no proceedings had been had.

If the Act be construed as conferring upon the carriers the right to proceed in any and every manner they may see fit to adopt, it is questionable whether the Act will, upon the whole, prove beneficial; it certainly will not have the effect of securing to all persons equal and fair treatment.

It is not to be overlooked that common carriers and officers and agents of common carriers have business, and other connections outside of the corporation itself, and may have personal or business reasons for requiring one, instead of another party, interested in or, in some way connected with a shipment of freight, pay an undercharge.

If, in order to collect from the party primarily liable, it would be necessary for the carrier to go, or to send a representative a great distance, or otherwise incur great trouble or expense, and it were a question whether the carrier, or the party secondarily liable should be forced to incur this trouble and expense, it

might be permitted a carrier to sue the party secondarily or remotely liable, residing or suable at the residence of the carrier, and leave such person to pursue his remedy over against the party primarily liable. But we submit that there must be a limit to the latitude or discretion allowed a carrier in the selection of the party from whom it will demand the payment of an undercharge of freight.

The instant case will serve as an illustration:

Here, the proper party to collect this undercharge is Atchison, Topeka & Santa Fe Railroad Company; the parties from whom it should be collected are, first Great Western Smelters Corporation, residing at the point where the coke was delivered, where the partial collection of the freight was made, and having its office within half a mile of the office of that railroad company; second, Tutwiler & Brooks, residing at Birmingham, Alabama, and equally or more accessible to the plaintiff than is this defendant; and yet, the method adopted by the Atchison, Topeka & Santa Fe Railroad Company, who is evidently here the real party in interest, is to have the Louisville & Nashville Railroad Company, this nominal plaintiff, institute suit against this defendant, and require it to pay an amount, to reimburse itself for which, it would be necessary for it to go or send almost across the continent, to Mayer, Arizona.

We, therefore, submit that the courts have, and should exercise, some kind or degree of control in the matter of the collection of undercharges; and not leave this to the unbrindled, arbitrary whim or caprice of the carrier. Otherwise, the Act may promote, instead of preventing, unjust discrimination. This much, upon

the general principles and policies for the enforcement of the Interstate Commerce Act.

And now, with reference to the question of whether this defendant in error is, or ever was liable for the freight ~~for~~ carrying charges on this coke:-

We submit that in the first place, the defendant in error is not, in the true sense of that term, the consignor in these bills of lading. It is shown, both by the testimony of Mr. H. M. Brooks, which appears on pp. 94 and 95 of the Transcript, as well as by the terms and framework of the bills of lading themselves, that the coke was the property of Tutwiler & Brooks at the time it was delivered to the initial carrier, and from that time throughout until it was delivered to Great Western Smelters Corporation; and that Central Iron & Coal Company had with the transaction no connection other than that of agent of Tutwiler & Brooks, to perform the physical service of delivering the coke to the carrier. It is clear that the defendant in error did not bear or sustain to the transaction the relation of consignor. It could not have diverted or otherwise controlled the handling or disposition of the coke, but this power of control resided in Tutwiler & Brooks alone; and at no time during the transportation, would any carrier over whose line it was carried have recognized any instruction from the defendant in error in reference to it.

In reference to whether the District Court erred in refusing to give the general affirmative charge for the plaintiff in error, and in giving the general affirmative charge for the defendant in error, and whether the Circuit Court of Appeals erred in affirming these ruling of the District Court:-

In the first place, both parties having requested the general affirmative charge in their favor, it was for the District Court to decide the case upon the facts; and the action of the District Court, and consequently that of the Circuit Court of Appeals, will not be disturbed if there was any evidence to support the charge.

Beuttell vs. Magone, 157 U. S. 154, 157 (39 L. Ed. 654).

The rulings of the District Court upon the pleadings in the case indicate that this ruling in reference to the general affirmative charges requested by the respective parties was based on the learned District Judge's view of the sufficiency of the defendant's plea No. 12. The facts alleged in this plea were proven, as we submit, by the, in effect, uncontroverted testimony. But whether this be true or not, if, as stated by the Circuit Court of Appeals, there was evidence tending to support the averments to this plea, there was no error in the ruling of the District Court or in that of the Circuit Court of Appeals.

But apart from this, we submit that the defendant in error was entitled to a verdict on its pleas Nos. 1 and 2, being those of the general issue. Furthermore, while the District Court sustained the plaintiff's demurrers to the defendant's pleas Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 5A, 6A, 7A, 8A, 9A, 10A, and 11A, yet if this Court should find that the defendant would have been entitled to a verdict on any one or more of these pleas, had it been allowed the benefit of them, even if it should find technical error in any ruling of the District Court, or of the Circuit Court of Appeals, under the pleadings as finally framed, and the issues as finally joined, if it should be of the opinion that the de-

fendant was entitled to a verdict upon issue joined, if it had been joined, on any of its pleas to which demurrers were sustained, the case will be affirmed. And we respectfully submit that the facts set up in the defendant's pleas other than Nos. 1, 2, and 12, constituted a valid defense to this action; and these facts were also either absolutely proven, or if not that, then certainly to some extent supported by the testimony in the case.

We respectfully submit that the rulings of the District Court were more liberal to the plaintiff than it was entitled to have, and that the requirements made of the defendant by the learned District Judge were too strict, and more than should have been required of it.

In a word, we submit that in any view which can be taken of the case, the defendant was entitled to a verdict in the District Court, and hence this case must be here affirmed.

In reference to the cases cited in the brief of plaintiff in error in support of this second proposition:- We submit that none of them are in point here.

In the case of Pittsburgh C. C. & St. L. R. Co. vs. Fink, 250 U. S. 577, (63 L. Ed. 1151), while the Court remarks that "No agreement appears to have been made with the consignor that Fink should pay the freight charges," yet it plainly appears that whatever may have been their agreement as to who should ultimately bear the cost of the transportation of the relics, it was contemplated from the beginning, by both the consignor, the carrier and Fink, that the latter should make payment to the delivering carrier. This clearly appears from the fact that the consignor paid, and the

initial carrier collected, at the time of the shipment, nothing on account of freight; and that, upon delivery of the goods to him, Fink paid what was thought to be the amount due. So, this case, in its last analysis, establishes only that where, upon the delivery to the consignee of goods, there is paid by him and collected by the carrier a sum less than that actually due, the consignee remains liable for such balance as may be subsequently found to be actually due; and this, although, by an error of the carrier, the consignee may have been led or induced to do some act to his disadvantage. Nothing which is there said of Fink is applicable to the plaintiff in error here.

The case of New York Central & Hudson River R. Company vs. York & Whitney Company, 256 U. S. 406 (65 L. Ed. 1016) is to exactly the same effect as Pittsburgh, etc. R. Company vs. Fink; was decided upon the authority of the latter; and contains no further or different principle. In both cases, the consignee accepted the goods and intended to pay the true amount of the freight, and the sole question involved and decided is that a consignee who has accepted from a carrier delivery of goods consigned to him, is not released from liability to pay the amount really due, by the error of the carrier in stating the amount due to be less than the true amount, and accepting at the time of the delivery of the goods a sum less than that actually due.

At this point in the brief of counsel for plaintiff in error we reach the error in the statement of the facts of the case to which we drew attention in our statements of facts; namely, that it was undisputed

that demand was made on the defendant for this undercharge before suit was filed.

As already stated, this is an error; there having been in the trial court, and being in this record, absolutely no testimony on this subject.

At this point in their brief, counsel for plaintiff in error make an unwarranted connection or association between the defendant in error and Tutwiler & Brooks;- there is nothing joint or in common between these parties, and the association or coupling of them together is unwarranted. If any proceedings against Tutwiler & Brooks were appropriate, the plaintiff in error was the proper party to assume that part. It may be that the Great Western Smelters Corporation sustained to Tutwiler & Brooks the liability or obligation suggested on pp. 16 and 17 of the brief of the plaintiff in error, but it sustained no such liability to or relations with the defendant in error.

It is stated in the brief of opposing counsel that "The Circuit Court of Appeals impliedly recognized, and the courts uniformly held that if the consignee actually becomes insolvent before suit is brought against the consignee, then the consignor must pay."

There is no ground for stating that the Circuit Court of Appeals impliedly recognized this rule. It is true the learned District Judge, by his rulings on the pleadings, required the defendant to allege, as it does in its plea No. 12, that this undercharge could have been collected from Great Western Smelters Corporation at any time up to the date of the institution of this suit; but the Circuit Court of Appeals simply held that this plea stated a good defense, but did not hold

that nothing short of this would have constituted a good defense.

While we cannot cite any express authority for it, that is, no case holding to that effect, yet we submit that the true rule is, and this should be adopted, that, in the case of a real actual consignor (as this defendant in error is not) a carrier cannot hold a consignor liable, if it omits to proceed against the consignee, (if he or it be the party primarily liable for the undercharge) within a reasonable time after the delivery of the goods to him. As already observed, in its ruling on this point, the District Court required of the defendant more than should have been required.

THE ZEMURRAY CASE.

Attention is drawn by counsel for plaintiff in error, and stress is laid upon the fact that the Circuit Court of Appeals, in its opinion in this case stated:

"We find no question in this case involving the Elkins law, or any other interstate commerce laws;"

as if to say that the opinion and decision would have been different if the Court had considered that case as within and governed by the provisions of the Interstate Commerce Act.

But it will be observed that the Circuit Court of Appeals follows the above quoted passage with the further statement:

"Waiving, however, the question of jurisdiction, we find no reversible error in the proceedings of the District Court;"

showing that in the opinion of the Circuit Court of Appeals, in considering and deciding cases arising under and governed by the Interstate Commerce Act, courts should not, and will not wholly lose sight of or disregard the principles of fairness, equity and justice. In this the Circuit Court of Appeals was correct; for the reason, besides others, that the primary object and purpose of this act is to promote, require and enforce fair, equal dealing between all parties having occasion to avail themselves of the services of the common carriers of our country, which are public utilities, and exist, are supervised, and, in a measure, controlled by the Government in and for the interest of the public, along with the interest of the stockholders of these corporations; and in the interpretation, application and enforcement of the Act, courts will never lose sight of, but always have in mind, the mischiefs or abuses which the Act was intended to abolish and prevent, and the reforms and beneficial results it was intended to accomplish.

Whether the rule as laid down in the *Zemurray* case be based on the principle of estoppel, election, the prevention of injustice, or the promotion of fair dealing, it is sound law, and just such as this Honorable Court would have adopted and applied had the question first arisen here.

At this point (on page 21 of the brief of counsel for plaintiff in error) we reach the following passages:-

“That as between the consignor and consignee the latter was equitably liable was decided on ex-parte evidence. The consignee’s side of the story was not heard.”

If he had been before the Court he might have shown, as often is the case, that the consignor misrouted the shipment which was the cause of the extra charges.

In the case at bar, if the Court had had the power to finally determine liability as between the consignor and consignee, and to require the one equitably liable to pay, the same situation might have developed. Presumably, the entire contract of sale was put in evidence and there is nothing to show the consignor was directed to route the coke, yet it did so. (Trans. 60.) The consignee actually paid \$12.50 a ton freight charges, while over the route the shipment moved the rate was \$21 a ton, and the shipment moved prior to the advances in rates made by the Director General."

We assume that the Court will treat this as if it were not included in the brief.

There was introduced in the District Court all of the testimony offered by either and both parties, and it is inappropriate to state, at this stage of this case, what further testimony may have existed or might have been obtained. There was absolutely not a syllable of testimony received or offered in the District Court in reference to misrouting this coke. As shown on p. 60 of the Transcript:

"It was admitted in open court by the defendant that the routing on the said bills of lading was written into the same by an agent of the defendant, so as to dispense with formal proof of that fact;"

but there was absolutely no testimony to show, and no

suggestion made by the plaintiff that this "routing" was a "misrouting"; nor was there any proof, or any suggestion that if the coke had been routed differently, the lawful transportation charges would have been different; or even that there was any other different rate over any other route, as stated in the foregoing extract from the brief of counsel.

The Circuit Court of Appeals in the Zemurray case, and in this case, referred to, and it may be that it based its ruling on, the fact that the consignee remained solvent until after the institution of the suit. The Circuit Court of Appeals may have considered that in order to warrant its ruling in these cases, it was necessary that the consignee remain solvent until the date of the institution of the suit; or it may be that the Circuit Court of Appeals based its rulings upon this fact because it happened to be the fact in each of those cases, and did not deem it necessary to go further than was necessary in order to decide the particular case then before it.

But we submit that in order to justify the ruling made in the Zemurray case, and in this case, it is not necessary that it appear that the consignee was solvent up to the date of the institution of the suit, but only for a reasonable time after the delivery of the goods to it.

In this connection, we beg to draw the attention of the court to the fact that in this case, after the delivery of the coke to Great Western Smelters Corporation, this company remained in active business, was constantly acquiring, possessing, and using personal property, and this property actually passed through the hands of the delivering carrier, and was from time

to time delivered by it to the Smelters Corporation. We do not take the position that the delivering carrier had on these several and various lots or articles of property passing through its hands, a lien to secure the payment of the balance due it from the Smelters Corporation as freight charges on this coke, which had already been delivered; but, to say the least of it, these transactions certainly informed and brought definitely and vividly to the attention of the delivering carrier the fact that the Smelters Corporation owned property out of which the carrier could have easily collected this amount due it. (Tr. pp. 119-120).

Not only this, but during this entire period the Atchison, Topeka & Sante Fe R. R. Company, the delivering carrier, and the real party in interest in this suit, had in its possession a deposit of money belonging to Great Western Smelters Corporation, to cover and secure the payment of any amount which might at any time become due to it from Great Western Smelters Corporation on account of freight; and after the Railroad Company refused to give a guarantee for the safety of this money, the Great Western Smelters Corporation executed to it, and it held, the bond of the Smelters Corporation in the sum of Five Thousand Dollars to cover the same, or similar obligations.

We submit that, under these circumstances, it would be palpable and gross injustice to require the defendant in error to pay (to the Atchison, Topeka & Sante Fe Railroad Company, as it would be, in effect) the amount of this undercharge.

Counsel for plaintiff in error themselves criticise

and cite several cases in which courts have criticised the Zemurray case.

The truth is, in order to maintain the non-liability of the defendant in error in this case, it is not necessary to sustain or show that the holding and ruling in the Zemurray case is sound law, for the reasons above mentioned, viz:-

In the Zemurray case, the defendant was the owner of the goods, and sold and shipped them to the consignee, and had in the transaction of carriage, an actual pecuniary interest; while, as heretofore stated, there never was an instant during this entire transaction when the coke here in question was the property of the defendant in error, or when it had or could have exercised over it any control whatsoever; and it was, in no sense, to the defendant in error that the service of transportation was rendered.

But we respectfully submit that the ruling in the case of Yazoo & M. V. R. Company vs. Zemurray, 238 Fed., 789, is sound, reasonable, just, and should be followed.

This case was first decided by Judge Foster of the United States District Court for the Eastern District of Louisiana. There was no jury in the case, and both the law and the facts were decided by Judge Foster. Subsequent to the trial, the plaintiff submitted a motion for a new trial, and Judge Foster carefully reviewed both the facts and the law, and after mature consideration, overruled the motion.

The cause was taken by writ of error to the Circuit Court of Appeals for the Fifth Circuit, and there tried and decided by Pardee and Walker, Circuit Judges, and Grubb, District Judge, without dissent.

Later, in the case of *Western Ry. of Alabama vs. Collins*, 201 Ala., 455, (78 Sou. 833), the Supreme Court of Alabama, after argument by eminent counsel, and mature deliberation by Anderson, Chief Justice, and Mayfield, Somerville and Thomas, Associate Justices of that court, approved and followed it; and in the instant case that decision was reviewed, approved and followed by Justices Walker, Bryan and King of the Fifth Circuit.

We respectfully submit that these constitute no mean authority; and, without any disparagement to the learned Judges of the courts which have declined to follow the *Zemurray* case, we beg to draw the careful attention of this Court to the fact that this case has never been repudiated or adversely criticised by any court of grade superior or equal to that of the Circuit Court of Appeals for the Fifth District.

In reference to the cases in which this case has been adversely criticised, it may be that the learned Judges who wrote the opinions had not given the questions involved their usual careful consideration; and we would also venture to suggest that these eminent Judges may have failed to apprehend correctly, and may have placed too much stress upon what they conceived to be, the meaning, effect, and influence of the Interstate Commerce Act upon the questions involved.

Of the cases cited by counsel for plaintiff in error as opposed to the *Zemurray* case, we are not prepared to concede that one of them is sufficiently analogous to amount to an authority contrary to that case;—certainly none of them are exactly in point here; that is, the facts of none of them are strictly analogous to the facts of the instant case.

In the case of *Gt. Nor. Ry. Co. vs. Hyder*, from the District Court of South Dakota, 279 Fed., 783, the goods were shipped by the owner, consignor, to the defendant, consignee, upon consignment, for sale by her for account of the shipper. The contract between the shipper and the consignee provided that the former should pay all freight charges, and it did, at the time of delivery to the carrier, pay what was then supposed by both to be the true amount due. The delivering carrier, at the time of delivering the goods to the consignee, stated to her that the freight had been prepaid. It was afterwards found that the amount paid was less than the true amount due, and the carrier sued the consignee for the balance. The defendant pleaded that she was not, at the time, the owner of the goods, and that she had not, but that the shipper had, contracted to pay the freight.

Under these circumstances, that Court employed the language quoted on p. 22 of brief of counsel for plaintiff in error.

In the case of *N. Y. Cent. R. Co. vs. Fed. Sugar Ref. Co.* (N. Y.) 139 N. E. 234, the defendant was the owner of the sugar in question, and was both the consignor and consignee, and the goods actually belonged to it at the time the service of carriage was rendered, and the freight charges incurred, and it was to it and for its benefit that the service by the carrier was rendered.

In the case of *C. C. C. & St. L. Ry. Co. vs. Southern Coal & Coke Co.* (Tenn.) 248 S. W. 297, the coal involved was sold direct by the shipper to the consignee, Solon, who, in turn, sold it, while in transit, to Toledo Ice & Cold Storage Company, to whom it was deliver-

ed. The delivering carrier delivered the coal to Toledo Ice & Cold Storage Company without collecting the freight; but subsequently, and before suit, collected from its bankrupt estate all that could be collected. The Supreme Court of Tennessee held that the shipper was liable for the balance; and in discussing the Zermurray and Collins cases, stated :-

"In both (of these) cases it is inferable from the records that the consignees were solvent and had accepted the goods, which distinguishes those cases from the one under consideration."

And adds:-

"In our opinion, upon the authorities hereinabove referred to, the consignor can only be relieved from liability by paying the freight, except where the statute of limitations has intervened, and this is undoubtedly true where the consignee is solvent."

That Court further remarked:

"Here we have a debt for which the defendant is primarily liable, and which, under the authorities, can only be met by payment. The complainant had no contract either with Solon (the original consignee who sold the coal while in transit) or the Toledo Ice & Cold Storage Company (who purchased the coal from Solon and accepted it from the delivering carrier.) Under the facts of this case, Solon was not liable to it."

In the instant case, Tutwiler & Brooks were liable

for the freight because the service was rendered to them, they having instructed the defendant in error to direct the plaintiff to transport the coke, and being the owners of it until after its arrival at destination; and Great Western Smelters Corporation was liable because it accepted the coke and agreed to pay, and did pay a part of the freight.

In the case of the N. Y. N. H. & H. R. R. Co. vs. Tonella (New Hampshire) 111 Atl. 341, the defendant was the consignor, and was a party to an express contract to sell the marble in question to the consignee. In that case the Supreme Court of New Hampshire lays stress upon features in which that case differs radically from this, and which we insist should distinguish that case from this, namely, the neglect of the Atchison, Topeka & Santa Fe Railroad Company to make proper efforts to collect from the Great Western Smelters Corporation, or failing therein, to promptly notify the other party interested, who, as we insist, was the firm of Tutwiler & Brooks. We note the following language employed by the Supreme Court of New Hampshire :-

"Nor does it appear that the plaintiff, after discovering the error in the freight charged in the first instance, unreasonably delayed notifying the defendant of the fact. In fact, it appears it acted expeditiously. It performed its full duty under the circumstances in seeking to recover of the defendant not only what was due for the service performed, but what it was required by the statute to collect."

How different in this case!

The case of Wells, Fargo & Co. vs. Cuneo is from the District Court of the Southern District of New York. In that case, it does not appear who was the owner of the goods, whether consignor or consignee; it does not appear but that the goods were the property of the consignor, and consigned to the consignee merely as the agent of the former; - it not even appearing that the goods had been sold to the consignee, or but that they still remained the property of the consignor after delivery to the consignee.

The case turned on the construction of the provision contained in the bill of lading that the goods were "delivered by the defendant and accepted by the plaintiff under a lawful agreement that the plaintiff would collect its lawful charges for transporting the same from the consignees thereof and from **no other person;**" and the Court held this provision invalid and no defense to the shipper in the action by the carrier to recover an undercharge of freight; and in the course of the opinion remarks:

"Because the consignor is the party for whom the service is performed."

It is therefore plain that the decision is based upon the fact that it appeared that the defendant was the owner of the goods and that it was for him that the service was performed.

Hence that case is not analogous or applicable to this, where the defendant was not the owner of the goods or the person for whom the service was performed.

It also appears that in that case demand was made upon the defendant and that the consignee refused to pay and the court said:-

"It was the duty of the plaintiff as a carrier in interstate commerce to collect the charges and if the consignee will not pay, plaintiff is not called upon to sue the consignee, but may look to the shipper."

Nor was that a case to recover an undercharge remaining after the payment (by either consignee or other person) of any sum on account of the freight, but was for the entire amount of the freight, nothing having been previously collected on that account.

In the case of Montpelier & W. R. Ry. Co. vs. Bianchi & Sons (Vermont) 113 Atl. 534, the defendants, consignors, were the manufacturers of the goods and had themselves made a direct sale of them to the consignee and delivered the goods to the plaintiff carrier in the fulfillment of their contract of sale to the consignee; and the Court in that case remarks:-

"The fact that the title to the monuments vested in the consignees when the monuments were loaded on the cars has no force, it not appearing that the plaintiff knew that fact at the time of the shipment."

It was also stated in that case that the delivering carrier tried to collect the undercharge from the consignees before proceeding against the defendants, consignors, but was unable to do so for the reason that one member of the consignee firm had died, leaving no estate, and that the other was insolvent.

It would seem unnecessary to detain the Court longer with a review of the cases cited by counsel for plaintiff in error, none of which, as it appears, are analogous to the instant case.

The point is made that, as both parties had requested the Court to direct a verdict, each in its favor, the learned Judge of the District Court, instead of himself deciding the case, gave to the jury the general affirmative charge in favor of the defendant.

We anticipate that this Court will find that objection without force, the two courses being the exact equivalent of each other. There being testimony on which the District Court might have properly rendered a verdict in favor of the defendant, which verdict would not have been disturbed by an appellate court, either this Court or the Circuit Court of Appeals, it cannot be successfully contended that it was reversible error on the part of the District Court in directing the verdict and having the jury actually return it.

We therefore respectfully submit that in this record there is no error prejudicial to the Plaintiff in Error, and that the cause should be affirmed.

Respectfully submitted,

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**IN THE
SUPREME COURT OF THE UNITED
STATES**

OCTOBER TERM, 1923

No. 198

LOUISVILLE & NASHVILLE RAILROAD
COMPANY,

Plaintiff in Error,

vs.

CENTRAL IRON & COAL COMPANY,
Defendant in Error.

**SUPPLEMENTAL BRIEF AND ARGUMENT FOR
DEFENDANT IN ERROR.**

After the date for the hearing of argument in this case was set, we were advised by wire that the date had been put forward, and we were under the necessity of closing our original brief hurriedly, and without therein considering the points in the case as we had desired and intended to do. And after reaching Washington at the time of the former setting of the case, counsel for plaintiff in error served on us a supplemental brief on their side of the case.

We, therefore, beg, and hope that the Court will permit us to file this, by way of supplement to our former brief in the case.

To resume the consideration of the cases cited in the brief of counsel for plaintiff in error, and the authorities on which these cases are based:

In the case of Penn. R. R. Co. vs, Titus, 216 N. Y., cited in the case of Pittsburgh & C. R. Co. v. Fink, the Court of Appeals of New York say:

"In the absence of something indicating the contrary, the consignee of goods is presumed to be the owner."

And in Rosenbush v. Bernheimer, 211 Mass. 146, the Supreme Court of Massachusetts say:

"It is evidence of ownership that one is named as consignee in a bill of lading."

And in Holt v. Westcott, 43 Me. 445, where the consignor was held liable for freight, the first head note is:

"In all cases where goods are shipped by a consignor under a contract or for his benefit, he is originally liable for freight."

and the Court quote with approval the following extract from Parsons on Mercantile Law:

"If the bill of lading requires delivery to the consignee or his assigns, (he or they paying the freight), which is usual, and the master delivers the goods without receiving freight, which the consignee fails to pay, the master or owner can not, in the absence of an express contract, fall back on the consignor and make him liable unless he can show that the consignor actually owned the goods; in which case, the bill of lading, in this re-

spect, is nothing more than an order by a principal upon an agent to pay money due from the principal."

And in *Blanchard v. Page*, 8 Gray, 281, the Court cite and quote from a number of cases holding that the true relations of the nominal parties to a bill of lading may be shown by parol testimony outside the bill itself, and finally says:

"And further, we think evidence aliunde is admissible to prove the facts not inconsistent with the terms of the written instrument. As, for instance, where the bill of lading imports 'shipped by A. B.', it may be shown that A. B. was the agent of C. D., or that the goods were shipped by his order or for his use, because not inconsistent with the fact, that the actual shipper did make the contract, and made it in his own name. In discussing this question, therefore, and in deciding who was the proper party to bring the suit, it seems to us, that we may with propriety take into consideration the facts as stated in this case, in connection with the bill of lading, as competent evidence, not for the purpose of proving a parol agreement, different from that expressed in writing, or that the parties meant and intended something different; but to prove the relations in which they stood, and the circumstances by which they were surrounded, in order to give full effect to the terms of the instrument."

In *Atlas S. S. Co. v. Columbian Land Co.* (C. C. A. 2nd Circuit) 102 Fed. 358, the defendant appellee, defended on the sole ground that, by accepting the note

of the consignee for the freight, the steamship company had released it, the shipper. There the Circuit Court of Appeals of the Second Circuit say:

"The appellant (meaning evidently appellee) a corporation doing business at Santa Marta, South America, **was the owner of the cargoes**, and, concededly, was indebted to the libellant for the amount, and remains indebted, unless its liability was extinguished by the act of the libellant in receiving the negotiable paper of Hoadley & Co., consignees of the cargoes, upon delivery of the cargoes to them. The consignees were the selling agents of defendant, **which was shipper and owner.**"

In the case of *Boston & M. R. R. v. National Orange Co.*, (232 Mass 351), 122 N. E. 313, where the Supreme Judicial Court of Massachusetts holds that the fact that the carrier gave credit to the consignee and did not inform the shipper that the consignee was in arrears, did not work an equitable estoppel against the carrier depriving it of the right to collect the freight from the shipper, that Court say:

"Railroad's right to recover freight charges from shipper does not depend on what may have been the legal effect of relation as between shipper **and its agent, the consignee; the shipper, as owner, still remaining primarily responsible.**"

And the opinion in that case states:

"The defendant, while conceding that the plaintiff has transported and delivered

the goods shipped under ordinary bills of lading, in which it was named as owner, and that the freight remains unpaid, contends that it is released, &c."

and also the bill of lading contains the provision:

"The owner or consignee shall pay the freight and all other lawful charges, and if required shall pay the same before delivery," and the Court say: "The Clerk (of plaintiff, the delivering carrier) had no authority to waive this provision of the bill of lading;"

All showing that it was as owner of the goods that the Court held the defendant, shipper, liable in this case.

In *Gt. Nor. Ry. Co. v. Hocking Valley Fire Clay Co.* (Wis) 166 N. W. 41, the facts were essentially different from those in the case at bar. There, the bill of lading was a straight one, in which the Hocking Valley Company appeared as shipper (and for aught that appeared, was the owner of the goods), and there was in that case nothing indicating that there was a third party who was the owner of the goods, and for whom the service of carriage was to be performed.

That distinguishes that case from this, where it appeared from the bill of lading that Tutwiler & Brooks were the owners of the goods, and that it was for them, and on their account that the service of carriage was to be, and was being performed.

In *Chicago I. & L. Ry. Co. v. Peterson* (Wis.) 169 N. W. 588, the defendants were at once, the owners of the potatoes in question, and also both consignors

and consignees in the bill of lading; and furthermore, under their contract with Wilkinson, the party to be notified, they were to pay the freight.

There, the defense was an alleged custom that the carrier should collect freight from the party to whom it delivered goods. The Supreme Court of Wisconsin say:

“To give effect to the alleged custom among shippers of potatoes and railway companies requiring consignee to pay freight charges before delivery would be to place defendant shippers of potatoes in a more favorable position than shippers in the same locality of other kinds of merchandise in whose favor no such custom existed; contrary to the Interstate Commerce Law.”

It also says that in bills of lading such as those above, the consignor is primarily liable for freight.

In *B. & O. S. W. Ry. Co. vs. New Albany Box & Basket Co.*, (Ind.) 94 N. E. 906, the defendant was the manufacturer **and owner** of the baskets, and contracted to sell them at a fixed price **delivered at Hudson, New York**. It arrived at the price at which it would sell its baskets by adding to its factory price, the amount which plaintiff's agent informed it was the freight from New Albany to Hudson. In this the agent erred—~~understanding~~ ^{fixing} the amount. The defendant, upon the basis of this information, fixed a price on the baskets, instructed the purchaser to pay the freight, deduct it from the purchase price, and remit it the balance:—which the purchaser did.

It turned out that the agent of the initial carrier

had made an error in informing defendant as to the amount of the freight, and the agent of the delivering carrier had collected from the purchaser less freight than was due, leaving unpaid the balance for which the carrier sued defendant. So, here it was the defendant who owed, and was liable to pay, and intended to pay the freight, and it was only as its agent that the purchaser, consignee, paid what he did on account of the freight; and the only point decided is that the carrier's agent misinformed the defendant as to the amount of the freight, did not relieve it from liability for the true amount. *fact*

In Atchison, T. & S. F. Ry. Co. vs. Stannard, (Kans.) 162 Pac. 1176, the defendant and shipper was the owner of the nursery stock in question, and delivered it to the carrier for shipment to a party in Pennsylvania, who declined to accept it or pay the freight on it.

The defendant set up as a defense an alleged understanding with the Railroad Company to the effect that the carrier should act as the agent of the consignee, should see that the latter paid the freight, or if not, to promptly notify defendant; and that in this case it failed to do so.

In that case, the Supreme Court of Kansas say:

"Since the shipper is the person who deals with the railway company and the one who induces the carrier to perform the transportation service, he is liable absolutely."

It is clear that while this was true in that case, it certainly is not true of the consignor in every case, or in the case at bar.

In *Jelks v. Phila. & Reading Ry. Co.*, (Ga.) 80 S. E. 216, the defendant, consignor, sold the melons in question to the consignee at a fixed price f. o. b. Tyty, Ga. **The consignee declined to accept, and did not accept the melons**, on the alleged ground that they were not of the quality ordered, and declined to pay the freight.

The carrier sold the melons in strict accordance with law, and sued the consignor for the deficit. In that case, the Court of Appeals of Georgia say:

"So far as the carrier is concerned, the consignee is regarded as the agent of the shipper, to pay the freight, and if he fails to pay, the consignor must take the consequences."

This language would never have been employed in reference to a consignor who sustained to the goods the relation which this defendant sustained to this coke; or where the bill of lading was in the form of these, and the facts such as those in the case at bar.

In *Nor. Pac. Ry. Co. v. Pleasant River Granite Co.*, (Me.) 102 Atl, 298, the stone-working lathe **was the property of the shipper**, and was sold by it to the consignee. The Court say that the defendant claimed that the machine was the property of the consignee at the time it was loaded on the car, and there was considerable testimony on one side and on the other, on this point; but that the carrier's contract and right to recover compensation for his services arise from the circumstances of his employment. He has the right to look for his compensation, to the party who required

him to perform the service;" citing *Holt v. Westcott*, and *Wooster v. Tarr*.

And the Court there say:

"And it does not appear that the carrier had any information concerning negotiations between consignor and consignee as to the sale of the property from the former to the latter."

The bill of lading was in standard form, signed by the defendant and by the agent of the initial carrier, naming the consignee, the destination of the shipment and describing the property shipped. In this case, the main, if not the only question was, whether the condition written on the back of the bill of lading "owner or consignee shall pay the freight and all other lawful charges accruing on this property, and if required, shall pay the same before delivery," had the effect of exempting the consignor from liability. The consignor's relation to the property and to the transaction were such as to make it liable.

In *Coal & Coke Ry Co. v. Buckhannon River Coal & Coke Co.*, (W. Va.) 87 So. 376, while the coal in question was sold by the defendant to Hite & Rafetto, brokers, it was consigned to J. K. Dimmick and Company, to whom Hite & Rafetto had sold it, and in the bills of lading the defendant appeared as consignor, and J. K. Dimmick & Company as consignees. This was not an "Order" bill of lading, and, besides the carrier, there were to it only two parties, namely:—the consignor and the consignee.

It did not appear from the bills of lading, or otherwise, to the carrier, that it was to or for any one other

than the defendant that it was performing the service of transportation and the Court draws attention to the fact that the bills of lading "Do not purport to be made by defendant as agent for the consignee." Therefore, that case is no authority ~~or~~ precedent here. It is further to be noted that in that case, the delivering carrier had made every effort to collect from the ultimate consignee, whose bond it had to secure freight to become due it, but the consignee had become insolvent, and owed the delivering carrier the full amount of the bond, and an additional sum, which had not been paid.

In *Bush, Receiver, v. Keystone Driller Co.*, (Mo.) 199 S. W. 597, the defendant was both the **owner of the goods, and also both the consignor and consignee in the bill of lading**. Furthermore, while the plea to which demurrer was sustained alleged that the ultimate consignee was solvent at the time the goods were delivered to it, it further stated that it had become insolvent before the suit was filed.

In *Yazoo & M. V. Ry. v. Picher Lead Co.*, (Mo.) 190 S. W. 386, the defendant was the **owner of the lead shipped**, and at the request of a commission company to which it had sold it, shipped it from Joplin, Mo., to a purchaser from the commission company at Clarksdale, Miss.

In the bill of lading (which seems to have been a standard, straight one) the defendant was the consignor, and the purchaser at Clarksdale the consignee, and no other party appeared in it. There was no evidence, either in or outside of the bill of lading, indicating that the consignor was not, or that any other person was, the owner of the lead.

In *Waters v. Pfister Vogel Leather Co.*, (Wis.) 186 N. W. 173, the defendant was the consignee, and accepted the goods, and thereupon paid what was then thought to be the correct amount due, and the holding was simply that, by accepting the goods, they became liable for the true amount due.

In the case of *So. Ry. Co. v. So. Cotton Oil Co.*, (Ga.) 91 So. 876, there is no opinion, and no statement of facts, but simply a syllabus, stating:

"A railroad company, which through mistake or negligence has failed to collect from a consignee the charges due for transportation, is not estopped from recovering them from the consignor merely because of failure to sue therefor until after the consignee (who by agreement with the consignor is liable for the freight) has become insolvent."

The bill of lading is not set out, nor is there any statement of its form or contents, nor is the relation of the consignor to the goods or the transaction shown otherwise than as above.

In *N. Y. Cent. R. Co. v. Warren Ross Lbr. Co.*, (N. Y.) 13 N. E. 324, the defendant was both the **owner** and the **consignee** of the goods, and it was for it that the service of carriage was performed. Also the party to whom the plaintiff was directed by the defendant to deliver, and to whom it did deliver the lumber, was insolvent.

In the case of *Cent. of Ga. Ry. Co. v. B'ham Sand & Brick Co.*, 9 Ala. Ap. 419, the defendant purchased the sand in question at, and was to pay the freight

from Bull Creek, Georgia. The plaintiff collected from the defendant, who willingly paid, as the party owning it, upon delivery of the sand at destination, the freight thereon according to the rate inserted by plaintiff's agent at the initial point, in the bill of lading.

The only point decided is that the fact that plaintiff's agent undertook to grant, and inserted in the bill of lading, a rate less than the true rate, did not estop it from claiming, or constitute a defense to the defendant in an action by the carrier to recover, the difference between the amount paid and the amount due according to the lawful rate.

In the case of *N. Y. Cent. Ry. Co. v. Phila. & R. Coal Co.*, 286 Ill. 267, the car of coal in question was "delivered in Pennsylvania to a carrier, on Feb. 14, 1912, by the defendant, Coal Company, consigned to itself at Chicago. At Buffalo the coal was delivered (by a preceding connecting carrier) to the plaintiff, which transported it to Chicago, where it arrived Feb. 19, 1912. On Feb. 20, 1912, defendant by an order, in writing, directed that it be forwarded to A. F. Cook & Co., who had purchased the same and agreed to pay the freight thereon, at Pullman, Illinois, via Ill. Cent. R. R., the order stating "charges follow." The delivering carrier delivered the coal to Cook & Co., the purchasers, without collecting the freight charges, and the suit was against Phil. & R. Co., **which was, at once, owner, consignor and consignee**; and under this state of facts, that Court say:

"Under all the authorities appellant was primarily liable for the lawful transportation charges, and the weight of authority is to the effect that such liability can only be released by payment," which was true in

and of that case. In that case the Supreme Court of Illinois deemed it worthy of mention that:

"At the time it delivered the coal to Cook & Co., the plaintiff demanded of the former payment of the freight, but the same was not paid. That several other demands were made of Cook & Co., but without avail; and on Sept. 19, 1912, plaintiff brought suit against Cook & Co. and recovered a judgment for the amount of the freight, which judgment still remained unsatisfied."

In the case of *L. & N. R. R. Co. v. Maxwell*, 237 U. S. 94 (59 L. Ed. 853) the defendant purchased from the plaintiff direct, a ticket from Nashville to some other point, and the only question which was, or which could have been decided, was whether the fact that the plaintiff's agent stated to defendant before he purchased the ticket a rate less than the true one, constituted a defense to the action by the carrier for the difference between that quoted to, and collected from, defendant at the time he purchased the ticket, and the true rate.

There the defendant was the party, and the sole party, besides the carrier, to the transaction. Neither had the defendant in consequence of the error of plaintiff's agent, changed his position for the worse. The remarks of Mr. Justice Hughes in that case are not applicable to the case at bar.

In *Jobbit v. Gounday*, 29 Barb. 509, cited in *Wells Fargo & Co. v. Cuneo*, 241 Fed. 727, in the quotation from the latter case contained on p. 25 of brief of plaintiff in error, the question was whether the plain-

tiff, carrier, released defendant, **owner, consignor and shipper**, by delivering the goods to the consignee and taking his check for the freight. In that case it is stated that the goods shipped **were the property of the consignor, shipper and defendant.**

In Chicago *V. N. W. R. Co. vs. Queenan*, 102 Neb. 391, the shippers or consignors were making a sale of the hay in question direct to the consignee (though f. o. b. initial point); and the opinion contains the statement that the bill of lading was a straight one. It also emphasizes the fact that the hay was consigned to South Omaha, and that the Nebraska Railway Commission had provided that: "Shipments of hay for Omaha or South Omaha must not be received unless charges are prepaid or guaranteed." —drawing, as we think, attention to the fact that if pre-payment or guarantee had been demanded, defendants would have made or guaranteed payment.

This case cites, and quotes with approval from the case of *Cin. N. O. & T. P. R. R. Co. v. Vredenburg Saw Mill Co.*, 13 Ala., Ap. 442.

The latter case was decided June 20, 1915, long before the Collins case; and furthermore, in that case the Alabama Court of Appeals say:

"There was an implied contract that it would, as the shipper **who had on its own account** engaged the services of the plaintiff as carrier, pay the legally established transportation charges if the consignee should refuse to accept the shipment and pay the lawful charges. Otherwise there would be no way in those cases where the consignee rightfully refuses to accept the shipment and is not re-

sponsible for the charges of carriage, to enforce the statutes requiring common carriers, under stipulated penalty, in case of failure to exact and collect lawful published and established rates and charges."

In this case the consignee declined to accept the lumber in question, defendant was notified, and declined to pay the freight, and the lumber was sold by the plaintiff for the charges, and did not bring a sufficient sum to cover them.

The bill of lading seems to have been a straight, standard one, in which there were only two parties, consignor (defendant) and consignee.

The case of *Union Freight R. R. Co. v. Winkley*, 159 Mass. 133, was decided by the Supreme Court of Massachusetts in 1893, Mr. Justice Holmes being at the time a member of the court. The court there say:

"A consignor of merchandise delivered to a railroad for transportation may be the owner and act for himself, or he may be an agent for the owner and act for him, and this may or may not be known to the railroad company. From the agreed facts it appears that the title to the ice passed to Merrick when it was put on board the car, and that it was transported at his risk. The doctrine of the courts of the United States seems to be that the property in goods shipped is presumably in the consignee, although this presumption may be rebutted by proof."

The case of *Finn v. Western R. R.*, 102 Mass. 283, referred to in *Un. Frt. Railroad v. Winkley*, 159 Mass. 133, was one by the carrier against the shipper. In that case, the Supreme Court of Massachusetts, in speaking of the liability of a common carrier say:

"Prima facie, his contract of service is with the party from whom, directly or indirectly, he receives the goods for carriage; that is, with the consignor. When carrying goods from seller to purchaser, if there is nothing in the relations of the several parties except what arises from the fact that the seller commits the goods to the carrier as the ordinary and convenient mode of transmission and delivery, in execution of the order or agreement of sale, the employment is by the seller, the contract of service is with him, and actions based upon that contract may, if they must not necessarily be in the name of the consignor. If, however, the purchaser designates the carrier, making him his agent, to receive and transmit the goods, or if the sale is complete before delivery to the carrier, and the seller is made the agent of the purchaser in respect to the forwarding of them, a different implication would arise and the contract of service might be held to be with the purchaser. Although this was not a suit to recover freight, the principles on which it was decided are applicable to such a suit, and the effect of this and the previous decisions, we think, is that in this Commonwealth, when the vendor of goods delivers them to a railroad to be carried to the purchaser, although the title passes to the purchaser by the delivery to the railroad company, and the name and address of the consignee, who is the purchaser, is known to the company, the vendor is presumed to make the contract for transportation with the company on his own behalf, and is held liable to the company for the payment of the freight. This presumption, however, is a disputable one, and may be rebutted or disproved by evidence; and if the vendee has ordered the goods to be

sent at his risk, and on his account, he also may be held liable as the real principal in the controversy." Then follows the quotation contained on pages 22 and 23 of our brief, from the opinion in the case of U. Frt. R. R. Co. v. Winkley, 159 Mass. 133 (38 Am. St. Rep. 398-402).

In Cent. Ry. of N. J. v. MacCartney, 68 N. J. Law 165 (52 Atl. 575), Mr. Justice Pitney, then a member of the Supreme Court of New Jersey, said:

"Prima facie the consignor of freight, who contracts with the carrier for its shipment, is liable to pay the charges of transportation. It is by him that the engagement is made with the carrier. **It is for him that the service is performed.** The question of his liability, however, is in each instance, dependent upon the terms of the agreement actually made between him and the carrier. Whether the consignor is shipping for his own account, or as agent of another, whether he is the owner of the goods; whether by the agreement between him and the consignees, the title to the goods passes to the latter at the time of delivery to the carrier, or upon delivery to the consignee,—these and other like circumstances have been discussed in the adjudicated cases as evidential upon the question of consignor's liability to the carrier for the freight."

The facts in that case were similar to those of the case at bar, and that case is in all essential respects, analogous to this.

The shipment there was interstate commerce, all of the cross-ties in question having been shipped from Brooklyn, N. Y., a part to Bound Brook and the remainder to Dunellen, both in the State of New Jersey. While the fact that the shipment constituted interstate

commerce is not specially referred to in the opinion, it is inconceivable that that fact should have escaped the attention of counsel on both sides and the court. The case was decided on June 9, 1909, and the shipment involved was made on July 2, 1898, long after the Interstate Commerce Act went into effect. In that case the court refer to the difficulties attending the collection from the party primarily liable, by either the plaintiff or the defendant, and state that that burden is properly on the carrier.

We therefore submit that none of the cases cited in the brief of counsel for plaintiff in error, nor any of those referred to in the cases so cited, are analogous to the case at bar, or constitute authority for the position taken by plaintiff in error, or against that of defendant in error; but all of the statements, remarks and observations contained therein, while perhaps true and correct in the connection in which they are made or employed, are so because of the particular facts of the respective cases in which such statements were made, and never would have been made or employed by the courts making or employing them, if the facts of the case under discussion had been those in the case at bar.

As showing the relation of the defendant in error to the bills of lading in this case, and to the coke covered thereby, and that this relation was known to the initial carrier, and every other carrier handling the coke, we beg to draw the attention of the Court to the following portions of the bills of lading:

In the body of the bill of lading itself, at the bot-

tom of page 50 of the transcript, is found the following provision :

“And which are agreed to by the shipper and accepted for himself and his assigns.”

It will be observed that the expression “his assigns” here employed, was not intended to apply to the defendant in error. The defendant in error could not have assigned the bill of lading, or made of it any disposition whatsoever, not having in the transaction such part, or to the bill of lading such relation as to authorize it to do so.

Next, near the top of page 51 of the transcript is found the provision “The surrender of this Original order Bill of Lading **properly endorsed** shall be required before the delivery of the property.” It will be observed that the expression “properly endorsed” here used, means endorsed by Tutwiler & Brookes, who were the consignees, and as such, the owners of the coke.

Next, the following expression:—“inspection of property covered by this bill of lading will not be permitted unless provided by law, or unless permission is endorsed on this original bill of lading or given in writing by the shipper.”

It is clear that this provision was designed to cover inspection at destination by Great Western Smelters Corporation. If permission for such inspection had been endorsed on the original bill of lading by the defendant in error, it would, in making such endorsement, have been acting as agent for, and under direction from Tutwiler & Brookes. It may be that the

permission referred to or contemplated by the expression "or given in writing by the shipper" was intended to cover such written permission given, either after the arrival of the coke at destination, or if not that, then at some time after the issuance of the bill of lading and before delivery. It is clear that after the issuance and delivery of the bill of lading, the defendant in error had no authority to grant or permit inspection of the coke, and that neither the initial carrier, the delivering carrier nor any connecting carrier would have honored or recognized or acted upon a writing by or from the defendant in error, instructing the carrier to permit inspection of the shipment.

Next, that portion of Section 1 of the Conditions contained on the back of the bill of lading, which is found at the bottom of page 53 and the top of page 54 of the transcript, as follows:

"Except in case of negligence of the carrier or party in possession, the carrier or party in possession, shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request."

It is here again obvious that the property would not be stopped or held in transit upon request of the defendant in error, and that no carrier having possession of the property would have recognized or acted upon any request of the defendant in error in reference to stopping, holding in transit or otherwise dealing with the shipment. The fact that the word "shipper"

is here employed can not be taken to mean that in this case, the defendant in error had the conceded right to require the property stopped, or held in transit; but that the word "shipper" was included, along with "owner" in this printed form, in order to make the form applicable to general use, and the word shipper was to have application where the conditions and circumstances of the transaction or shipment were such as to confer on the shipper the right to direct the handling of the goods.

Next, in this same Section 1 of the Conditions printed on the back of the bill of lading, there occur three separate and distinct references to handling of the goods under certain conditions, found in the second paragraph, and at about the middle and near the bottom of page 54 of the transcript; in which it is provided that, "in case of quarantine the goods may be discharged at risk and expense of **owners**," and again, "or goods may be returned by carriers at **owner's** expense and risk," and again, "quarantine expenses of whatever nature or kind upon or in respect to goods shall be borne by the **owners** of the goods."

It is clear that in neither of these cases does the word "owner," "owner's" or "owners," as here employed, apply, nor was it intended to apply, nor would there have been by the carrier any attempt to make them apply to the defendant in error; but that in each and every instance, was intended to apply to the person occupying the position of Tutwiler & Brookes.

Again, at the beginning of Section 4 of these Conditions, found at about the middle of page 56 of the

transcript, and in Section 5 at about the top of page 57, and again in Section 5 near the bottom of page 57, the expression "owner's" or "owner's cost" and "owner's risk" are employed, and it is clear that they were employed, and would have been by both the carrier and the person adversely interested, construed to mean and to apply to Tutwiler & Brookes, and not to the defendant in error.

Again, in the form of bill of lading referred to and in part set out on pages 29 and 30 of our original brief, if under the provision,

"Nothing herein shall limit the right of the carrier to require at time of shipment the pre-payment or guarantee of the charges."

the carrier should see fit to require, at the time of shipment, the pre-payment or guarantee of the charges, it is clear that it would be of the person occupying the relative position of Tutwiler & Brookes, the defendant in error, that such requirement would be made.

Therefore we submit that not only the testimony of H. M. Brooks, on pages 94 and 95 of the transcript, but the very terms of the bill of lading itself, show that the relation of the defendant in error to this coke was known to the initial carrier at the time it accepted the coke for shipment, and to every connecting carrier into whose hands it subsequently came; and that this relation was not such as to render it liable for the carrying charges, but such as to render it not so liable.

We therefore submit that, on the facts of this case,

(apart from the variance between the allegations and the proof, hereinafter mentioned), the defendant in error is not liable for this overcharge; that the ruling of the District Court was free from error; that the cause was properly affirmed by the Circuit Court of Appeals; and that there is no error in the record as presented to this Court.

In the first place, the relation of the defendant in error to the coke in question and to the bill of lading was not such as to render it liable for the freight on the same; and in the second place, if it had been so liable in the first instance, it was not liable for the overcharge in view of the manner in which the shipment was handled by the A. T. & S. F. Ry. Co., the delivering carrier.

But apart from these considerations, and irrespective of whether the defendant in error was liable under the facts of the case, the ruling of the District Court was correct, for the reason that there was a fatal variance, or rather several fatal variances, between the allegations of the complaint and the proof in the case.

The Judicial Code provides that:

In Federal Courts, the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of Court to the contrary notwithstanding.

(R. S. Sec. 914; Act June 1, 1872, ch. 255, Sec. 5, 17 Stat. L. 197.)

4 Fed. Stat, Ann. Sec. 914.

Sawyer v. White, 122 Fed. 227.

Roberts v. Lewis, 144 U. S. 656.

The provisions of the Code of Alabama in reference to pleadings, and evidence thereunder are as follows:

"The defendant may plead more pleas than one without unnecessary repetition; and, if he does not rely solely on a denial of the plaintiff's cause of action, must plead specially the matter of defense. In all actions for defamation, or for injuries to the person, or to real personal property, the general issue is "not guilty," and puts in issue all the material allegations of the complaint; in all other actions the general issue is an averment that the allegations of the complaint are untrue, and except as may be otherwise provided, puts in issue only the truth of such allegations."

Alabama Code of 1907, Sect. 5331.

Under these provisions, the Supreme Court of Alabama has uniformly held that where the defendant interposes a plea of the general issue, the burden is on the plaintiff to establish all of the material averments of the complaint, and upon his failure to do so the general affirmative charge for the defendant is properly given.

It is likewise uniformly held that a plaintiff, by including in his complaint the averment of certain facts, renders such facts material, and assumes the burden of making proof of them, although such facts may not be otherwise material to his case; and that his

failure to make proof of facts so alleged is fatal to his right to recover.

It has been held by the Supreme Court of Alabama that:

"In an action of a written promise to pay \$150.00, in consideration, as therein expressed of plaintiff's 'relinquishment of his lease' of certain premises, of which he was in possession under an alleged lease for a term of years; or, as expressed in the writing signed by plaintiff, of 'all right and claim to said premises under said lease;' the validity of the lease, or the term for which it is valid, is not an element of plaintiff's right to recover; it is immaterial whether his relinquishment was a technical surrender of the lease, an assignment of it to the defendant, or merely a general divestiture of plaintiff's rights under it; nor is it necessary for him to show that he surrendered possession to the defendant. Yet, having alleged in his complaint that he agreed to surrender, and did surrender, the lease and possession to the defendant, these averments become material, and he cannot recover without proving them."

Dexter v. Ohlander, 89 Ala., 262., (7 So. 115.)

And the Court there proceeds to say:

"Therefore, to the cause of action shown by the proof it was not essential that plaintiff should have technically surrendered the lease to defendant, or should have assigned it to him, or relinquished it in the sense of vesting his rights under it in the defendant; nor was it necessary for the plaintiff to have surrendered the possession to defendant.

Yet, the plaintiff in the first count of the complaint, alleges, and thus assumes the burden of proving,

that he agreed to surrender, and did surrender the lease to the defendant; and in the second count, it is negatively alleged that the contract there declared on required a surrender and delivery of possession to the defendant, and that plaintiff, in compliance with this contract, did so surrender possession to Dexter.

The plaintiff thus took upon himself to prove these facts, which we think are not material to his rights in the abstract, but only as he has asserted them.

If he failed to prove a surrender of the lease to the defendant, he was not entitled to recover under the second count; and if the jury had found that he had surrendered neither the lease nor the possession to the defendant, he was not entitled to recover at all.

Dexter v. Ohlander, 89 Ala. 262 (271) 7 So. 115.
Citing.

Alabama, Gt. So. R. R. Co. v. Mt. Vernon Co., 84 Ala. 173.

Where it is held:

"A recovery cannot be had against an intermediate or connecting carrier, operating part of a continuous route, under a complaint framed as against the receiving carrier, since the contract and liability of the two are materially different."

Citing Montg. & Eufaula R. Co. v. Culver, 75 Ala. 587, which is to the same effect.

And in the case of Alexander v. Woodmen of the World, 161 Ala. 561 (565) the Supreme Court of Alabama say:

"Plea No. 1 was the general issue, and merely denied the allegations of the complaint, as to which there was, and could be, no special replication. This, of course, placed the burden of proof upon the plain-

tiff to prove the averments of the complaint, before he was entitled to a verdict, or before one could be rendered against the defendant."

And in *Murphy v. McAdory*, 183 Ala. 209 (62 So. 706,) the Court say:

"The first and third counts, grounded on a false imprisonment, declare that the act was **maliciously** done. While malice is not an essential element of false imprisonment, yet when the offense is thus characterized in the complaint, malice must be proved or the case fails."

And in *Harris v. Sanders*, 186 Ala. 350;

"In an action against two persons jointly for the value of the services of a physician and surgeon, rendered at their request, proof that the services were performed at the request of only one of the defendants, was fatally variant with the complaint, and would not support a judgment against that defendant alone."

And in *Strain v. Irwin*, 195 Ala. 414, the Court say:

"Where plaintiff pleaded an illegal arrest, he thereby anticipated the defense of justification, and unnecessarily assumed the negative burden of proof; hence, a plea setting up justification under legal process or legally authorized action, was unnecessary."

See also

U. S. Health & Accident Ins. Co. v. Savage,
185 Ala. 232;
Wilkinson v. King 81 Ala. 156;
Milton v. Haden, 32 Ala. 30.

In this case the defendant, in addition to its special pleas, numbers 3 to 12, pleaded the general issue, which was set up in its two separate pleas Nos. 1 and 2, shown on page 14 of the transcript.

It will be noted by reference to the complaint in this cause, found on pages 4, 5 and 6 of the transcript, that the plaintiff made therein the following averments:

(1) "Defendant is a corporation **organized and existing under the laws of the State of Alabama, and is a citizen of the State of Alabama.**"

(2) "At the top of page 5 of the transcript, **that the freight claimed was earned by the plaintiff and its connecting carriers on shipments carried for defendant.**"

(3) "Said shipments were carried over the route directed **and safely delivered to the consignee named in the bills of lading.**" (See transcript near the bottom of page 5.)

It will be noted that, not only are Tutwiler & Brookes in fact the consignee, but the plaintiff had already specifically stated in its complaint that they were such consignee. (See transcript near the top of page 5.)

(4) The complaint also contains the further averment that, "There is a balance due **from the defendant** therefor of \$3,463.46, etc., (See transcript bottom page 5 and top of page 6.)

(5) The Complaint also contains the averment that prior to the institution of the suit **there had been made upon the defendant demand for the payment of the amount sued for.** (See transcript top of page 6, where is found the following averment, "**which the defendant has failed and refused to pay though often requested to do so.**")

It may be that some, and possibly all of these averments were, in and of themselves, not essential or material; and that the complaint would have been sufficient without them. But the plaintiff, having made them in its complaint, was required to prove them before it was entitled to a verdict ~~on~~ judgment.

In reference to the first averment above mentioned, namely, the State under whose laws the defendant corporation was organized, and the defendant's residence. We are not now considering the manner in which it was necessary for the defendant to present the question of the jurisdiction of the Court over its person, but the question of a variance between this averment and the proof. The defendant did, in fact, interpose pleas in abatement to the jurisdiction of the Court over both the subject matter of the suit and also the defendant's person; and these are found on page 9, 10, 11, 12 and 13 of the transcript. But the record shows no ruling by the District Court on these pleas.

But apart from the question of jurisdiction, the plaintiff made this averment material by including it in its complaint; and having failed to make proof of it, the defendant was entitled to the general affirmative charge in its favor.

Next, in reference to the averment that this shipment was carried for the defendant:

It is not sufficient for the purposes of the present question that the goods may have been carried under such circumstances as to render the defendant liable for the charges thereon, but, in order to recover under this complaint, the plaintiff was required to prove that the coke was carried for the defendant.

Next, in reference to this averment that the coke was "safely delivered to the consignee named in the bills of lading."

It will be borne in mind that the question now under consideration is not whether the delivering carrier made of the coke a valid delivery; that is to say, a delivery to the proper party; or a delivery which would relieve it from liability if sued for a failure to deliver; but it averred in its complaint, near the top of page 5 of the transcript, that the coke in question was delivered to it, "for shipment to **Tutwiler & Brookes as consignee;**" and further on in its complaint, at the bottom of page 5 of the transcript, avers that, "said shipments were carried over the route directed and safely **delivered to the consignee named in the bills of lading.**"

The fact that if sued for failure to deliver this coke the plaintiff or the delivering carrier could acquit itself from liability by showing delivery to Great Western Smelters Corporation does not answer the question now under consideration. In order to conform to the proof in the case as contained in the record, the averment should have been that delivery was made to Great Western Smelters Corporation, or to the person entitled to receive delivery, or that proper delivery was made; and if this had been done, the proof in the record would have been sufficient to support the aver-

ments of the complaint on that point. But the complaint plainly and specifically avers that delivery was made **to the consignee named in the bills of lading**; whereas the proof shows without controversy that delivery was not made **to the consignee named in the bills of lading**, but to an entirely different, separate and distinct person, namely Great Western Smelters Corporation.

So, in reference to the averment that this balance is due from the defendant, found at the bottom of page 5 of the transcript. This may not be quite so strong or clear as the other instances mentioned, but we submit that, in order to conform to the proof, the complaint should have alleged that, while this balance was due from Great Western Smelters Corporation, or from Tutwiler & Brookes, the defendant was, under the circumstances stated in the complaint, liable to the defendant for it.

In reference to the concluding averment that demand had been made upon the defendant for this amount prior to the institution of the suit:—here again the Court will bear in mind that the question now under consideration is not whether a demand was necessary as a predicate for the suit. Such demand may not have been necessary; and, other necessary elements being present, the plaintiff might have been able to maintain the suit without proof of prior demand. But the plaintiff chose to make specific averment **that demand had been made of the defendant for the payment of this over-charge**; whereas there is absolutely no proof of such demand.

It may be that the rule in Alabama in reference

to the correspondence or conformity between the allegations and the proof is rather strict and technical. (We confess that we do not know how it compares with the rules of other states on the same subject); but it is the rule, and is uniformly followed; and under the Federal Statutes, is to be followed by the Federal Courts of that State.

We submit that in the cases above cited from the Supreme Court of Alabama the matters alleged and not proven, and for failure to prove which the plaintiff failed, were in themselves, no more essential, important or material than the several matters alleged in this complaint and pointed out above, none of which were proven, and some of which were absolutely disproven by the undisputed testimony; and that, apart from other and more important considerations, for this reason, and on this ground, the plaintiff was not entitled to recover, and the general affirmative charge for the defendant was properly given by the learned Judge of the District Court, and the case properly affirmed by the Circuit Court of Appeals.

Lest this Court should conceive of the Supreme Court of Alabama, and the rule there in force on this subject, an unfavorable impression, we draw the attention of the Court to the fact that the Supreme Court of Alabama, recognizing the existence of the rule above stated, of the fact that it is and must be followed by the Courts of that State, from a commendable desire to prevent injustice resulting from its application, has adopted the following rule, which will be found in the front of Vol. 175 Alabama Reports:-

“Rule 34. Variance; Special Objection Making

Point; General Charge.—In all cases where there is a variance between the allegations and proof, and which could be cured by an amendment of the pleading, the trial court will not be put in error for admitting such proof unless there was a special objection making the point as to the variance. And the general objection that the same is illegal, irrelevant and immaterial, will not suffice. Nor will the trial court be put in error for refusing the general charge predicated upon such a variance unless it appears from the record that the variance was brought to the attention of the said trial court by a proper objection to the evidence."

It will be observed that the effect of this rule is that the trial court will not be put in error because of an obscure and unobserved variance between the allegations and the proof; but that the rule does not operate to put the trial court in error. For example, if in this case the verdict had been for the plaintiff, and error had been predicated or assigned upon some ruling of the trial court which was erroneous because of one or more of the variances above pointed out, the case would not be reversed unless the variance had been brought to the attention of the trial court at the time of the trial. But the verdict and judgment being in favor of the party opposed to that between whose pleadings and the proof the variance or variances existed, it is not necessary for it to appear that the trial court based its (correct) ruling upon such variance or variances.

We assume that this Court does not view with favor the decision of cases upon mere technicalities; but we feel equally safe in assuming that the Court will administer the law as it finds it; even though it may

lead to a result which the Court might more or less regret.

We suggest further that as righteous a judgment as that rendered in this case should be approved and affirmed if there can be found any legal ground for approval and affirmance. And beyond question that ground is found in the point last above made.

We repeat, that in this case, in the first place, the defendant in error was not, in the first instance, and never was, liable for this under-charge; that in the second place, if its relation to the coke in question, the shipment, the bill of lading, and the entire transaction, was such as to make it liable if the shipment, the collection of the freight, etc., had been properly handled by the delivering carrier, it was released by the manner in which the delivering carrier handled the transaction; under the principles and rules announced and followed in *Yazoo & M. V. Ry. Co. v. Zemurray*, 238 Fed. 789, and *Western Railway of Alabama v. Collins*, 201 Ala. 455; 78 South. 833, and in other cases in which the same general principles of equity and justice are found and followed; and lastly, that, other questions apart, the defendant in error was entitled to the general affirmative charge in the District Court because of one, several or all of the variances above pointed out between the allegations of the complaint and the proof in the case.

We therefore submit that there was no error in the rulings of the District Court; nor in those of the

Circuit Court of Appeals, and that this case should be affirmed.

Respectfully submitted,

HENRY A. JONES,

Attorney for Central Iron & Coal Co.,
Defendant in Error.

Allan C. Rearick,

A. C. Travis,

DeVane K. Jones,

Adrian V. Van de Graaff,

Of Counsel.

FILED
JAN 17 1924
WM. R. STANBURY
CLERK

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 198

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,
vs.

CENTRAL IRON & COAL COMPANY,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

GARDINER LATHROP,
HOMER W. DAVIS,
Attorneys for Plaintiff in Error.

EDWARD S. JOUETT,
FOSTER, VERNER & RICE,
Of Counsel.

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LOUISVILLE & NASHVILLE RAILROAD COMPANY,
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Defendant in Error.

ALLEGED INCORRECT STATEMENT OF CASE
IN OUR OPENING BRIEF.

On page 9 of the brief of defendant in error it is said that we were mistaken in stating in our opening brief that a demand was made on the consignor before suit was brought.

It is true that no testimony was introduced on this point, but the writer of the opening brief of plaintiff in error was of opinion that failure on the part of defendant in error to deny specifically, in any of the voluminous pleadings filed, the allegation in the complaint that a demand was made was a sufficient basis for the statement to which exception is taken.

However, be that as it may, the argument on pages

16 and 17 of our main brief will be just as strong if the reference to a demand before suit is stricken from it.

OUR COMMENT AS TO ROUTING, PROPER.

On pages 41-43 of defendant in error's brief objection is made to the statement in our main brief that if all parties had been before the court, and the court had been called upon to decide which one of them was equitably liable for the undercharge, the finding might have been different because there was nothing to show that defendant in error was authorized or directed to ship the coke over the route inserted by it in the bills of lading, or whether or not that was the cheapest reasonable route.

The Circuit Court of Appeals said:

“The facts clearly established that the corporation (ultimate consignee) was the party liable for the carrier's charge.”

The point we sought to make was that in this case a finding as to the status and liability of some one not a party to the record might be different if he was a party and at liberty to prove his side of the case and bound by any decision made.

The whole argument of defendant in error is that it was not equitably liable and an injustice would result if it were held liable in this case.

It is our view that when a defendant seeks to escape liability on a plea of that kind, the burden is on such defendant to prove its case.

There is proof here that the coal company sold the coke to Tutwiler & Brooks f. o. b. Holt, Alabama, and that “under and in pursuance of instructions from them, consigned said coke to said Tutwiler & Brooks at Mayer, Arizona.” (Trans., 35.)

There is no proof that it was directed to route the shipments. We think that as a part of its case the coal company, before it could escape liability on any equitable plea, would be compelled to go further and show either that it received routing instructions or that it routed the shipments via the "cheapest reasonable route."

Prior to June 18, 1910, the shipper had no right to route freight (*Southern Pacific Co. v. Interstate Commerce Commission*, 200 U. S. 346), but by Act of Congress of that date (36 Stat. L. 539) such right was specifically conferred. But long prior to that time and ever since the carrier was required upon receiving an unrouted shipment to transport it over the "cheapest reasonable route." I. C. C. Conference Ruling 214, paragraph (c).

It will be seen, therefore, that the coal company was not bound to route the shipments. It could have delivered them unrouted and complied with its contract and the consignee would have had to pay only the rate applicable over the cheapest reasonable route.

There is no presumption that the route inserted by the coal company in the bill of lading was or was not such a route, nor is there any proof.

What we tried to say in our opening brief was that the defendant failed to show any authority for its act of routing the shipments and also failed to show that its act was a proper one. Clearly the defendant failed to make out its equitable case.

ALLEGED UNUSUAL FORM OF BILL OF LADING.

The first three or four pages of defendant in error's brief are devoted to calling the court's attention to the alleged unusual form of bills of lading in this case. They

were simply order bills as the term is commonly used and defined by statute. See Section 3, Bills of Lading Act, 39 Stat. L. 538.

Upon the execution of these bills of lading the carrier received notice that the coal company probably would not be the owner of the shipments in transit and that Tutwiler & Brooks probably would be the owners, unless and until they endorsed and delivered the bills of lading over to some one else, thereby passing title.

In the case of an ordinary straight bill of lading the legal presumption is that the consignee becomes the owner of a shipment upon delivery to the carrier and the execution of the bill of lading. The consignor, solely by reason of the fact that he is such, has no right to divert or give further or other directions unless circumstances arise making it proper for him to exercise his right of stoppage *in transitu*.

But the form of a bill of lading does not determine title. "The legal presumption is that when goods are sent to a consignee, the title to them vests in him as soon as the shipment is made. It is solely, however, a question of intention or of agreement, and may be shown to be otherwise." (Hutchinson on Carriers, Third Edition, Section 194, pp. 211-212.)

So in this case if the coke in question had been shipped on an ordinary straight bill of lading in which the coal company was shown as consignor and Tutwiler & Brooks, or anyone else, as consignee, the carrier would have had just as much notice that the shipper had parted with title as it had under the bills of lading actually used.

We gather that counsel, by devoting so much space at the outset of his brief and in various other portions thereof to calling the court's attention to the form of

the bills of lading, is thereby attempting to distinguish the facts in this case from the numerous cases cited in our opening brief.

This was the course pursued by counsel for defendant in the case of *New York Central R. R. Co. v. Federal Sugar Refining Co.* 235 N. Y. 182, 139 N. E. 324, referred to on pages 22 and 23 of our main brief. In that case counsel was successful in persuading the Appellate Division (194 N. Y. S. 467) that an order bill of lading exonerated the consignor, but the Court of Appeals took a different view.

THE ZEMURRAY CASE.

Inasmuch as the case of *Yazoo & M. V. R. Co. v. Zemurray*, 238 Fed. 789, is referred to a number of times in the briefs of both parties and is relied upon by the Circuit Court of Appeals in its opinion, we have for the convenience of the court printed the opinion in full as an appendix to this brief.

Respectfully submitted,

GARDINER LATHROP,

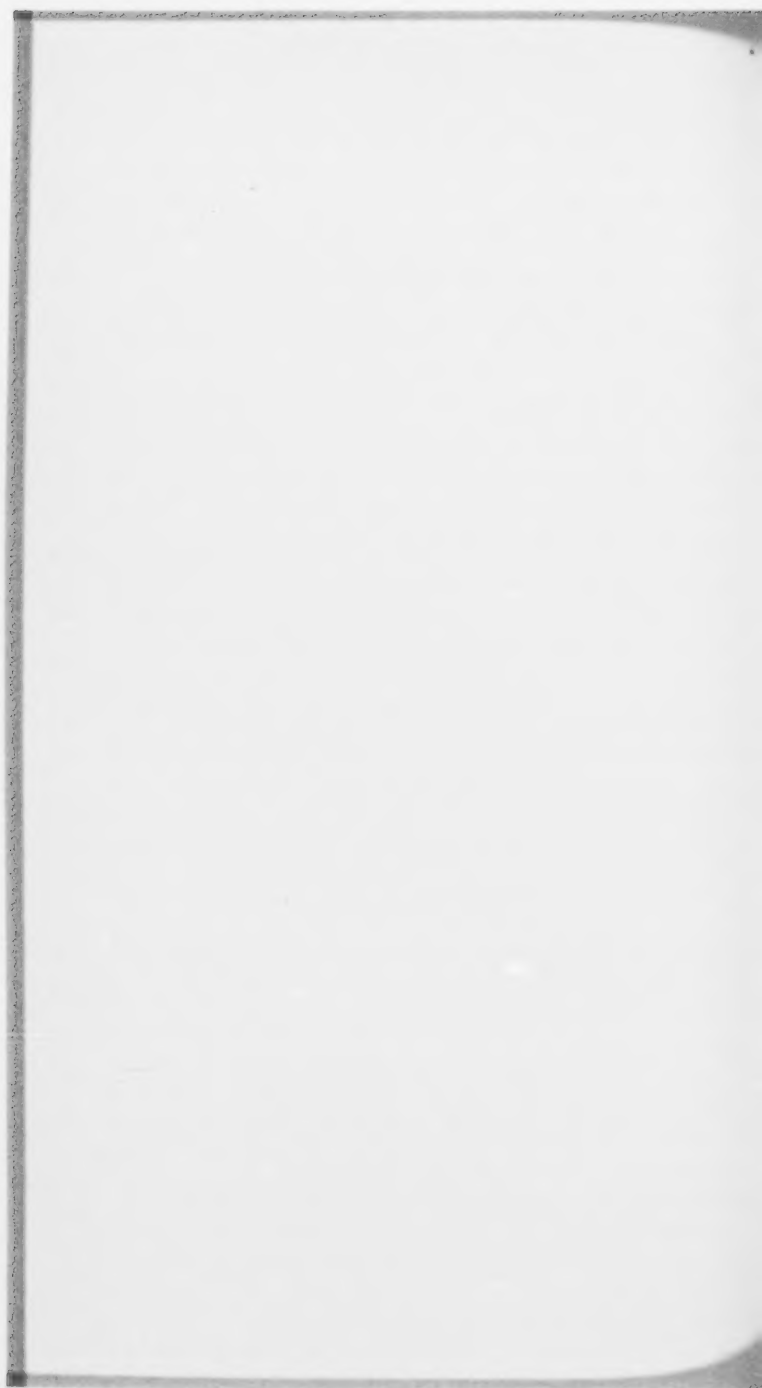
HOMER W. DAVIS,

Attorneys for Plaintiff in Error.

EDWARD S. JOUETT,

FOSTER, VERNER & RICE,

Of Counsel.



APPENDIX.

OPINION OF THE COURT IN THE CASE OF YAZOO & M. V. R.
Co. v. ZEMURRAY, 238 Fed. 789.

PARDEE, *Circuit Judge*. The facts of this case and the reasons for judgment in the District Court are fully stated in the opinion of the court overruling the motion for a new trial, as follows:

"In this case the plaintiff sues for \$36 freight on a shipment from New Orleans, La., to Natchez, Miss. The jury was waived, and the case tried in open court on the pleadings, admissions of counsel, and some evidence. The facts are not in dispute, and are as follows: Zemurray sold a carload of ripe bananas to A. Pegano at Natchez, Miss., terms f. o. b. New Orleans, La., but before shipping them required the purchaser to deposit the price in a bank in Natchez subject to his draft. The car was shipped consigned to Pegano, and the railroad issued its bill of lading in the usual form. The proper amount of freight was \$45, but the railroad made delivery to Pegano and by error collected only \$9. Thereafter, demand was made on Pegano for the balance. He did not pay. The attorneys for the railroad wrote him several letters, but did not sue him. The railroad made demand on Zemurray. He advised it of his method of making the sale, declined to pay the difference in freight, and subsequently advised the railroad of other shipments made to Pegano that might have been reached by process. It is not shown that Pegano was insolvent, and he was doing business at the time this suit was entered. There was judgment in favor of the defendant, and plaintiff has applied for a new trial.

The plaintiff contends that a carrier may waive its lien and deliver the freight and hold either the consignee or consignor, and this regardless of the usual clauses in bills of lading as to delivery to the consignees, he paying freight, and regardless of the ownership of the goods. Many cases have been cited, and the rule contended for seems to be supported by the weight of authority.

However, in deciding the case against the plaintiff, I did so because I was satisfied the railroad could have collected from the consignee, if it had sued him; that having elected to collect the freight from the consignee, who was the owner of the fruit and bound to pay the freight ultimately, it would be inequitable to permit the carrier to change its base and proceed against the consignor, who was only technically liable. Conceding that Zemurray was primarily liable to the railroad because of having made the contract, the mode of shipment was *prima facie* notice to the carrier that the shipper had parted with ownership on delivery of the goods to it and that the shipment was for account of the consignee. Before suit the railroad was advised of the actual facts, and property of the consignee subject to execution pointed out. Considering all this, I see no reason to change my opinion.

The motion for a new trial will be denied."

We might rest our decision upon the facts and reasons as given by Judge Foster, but we deem it proper to go further.

On the facts stated, we doubt the jurisdiction of the court on the ground that the amount involved is less than \$3,000. It appears to be a case of ordinary collection of a freight bill wherein the carrier through error and neglect failed to collect the stipulated freight from the consignee, and now sues the consignor.

We find no question in this case involving the Elkins law, or any other interstate commerce laws.

Since the shipment was regular in all respects and the only thing complained of is the failure of parties responsible to pay the freight, we are also of opinion that even on the case made the plaintiff in error delayed too long to bring suit, and his claim is prescribed under Louisiana law by three years as pleaded in the case.

Waiving, however, the question of jurisdiction, we find no reversible error in the proceedings of the District Court.

JUDGMENT AFFIRMED, WITH COSTS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
v. CENTRAL IRON & COAL COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT.

No. 198. Argued February 19, 1924.—Decided May 5, 1924.

1. No contract of a carrier can reduce the amount of charges legally payable to it under its tariff for an interstate shipment, or release from liability a shipper who has assumed their payment; nor can any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by the person liable. P. 65.
2. But, in the absence of a governing tariff provision, delivery of the goods for shipment does not necessarily import an obligation of the shipper to pay the freight charges, and the carrier and shipper are free to contract as to when and by whom payment shall be made, subject to the rule against discrimination. P. 66.
3. Where bills of lading acknowledged receipt of goods from the shipper but provided for delivery to the order of another as consignee, were not signed by the shipper, and contained no express agreement on his part to pay or guarantee payment of the freight charges, and there was evidence that the goods were sold and shipped by the shipper to the consignee upon agreement between them that the latter should pay those charges, and were transferred by the consignee with the bills of lading to a third party who received delivery from the carrier, *held*, that a finding that the

shipper did not assume the primary obligation to pay the freight charges was justified. P. 67.

4. To enforce payment of freight charges by a shipper only secondarily liable, the carrier must first make effort to collect from those primarily liable. P. 69.
 5. A consignee, by accepting the shipment, becomes liable as a matter of law for the full amount of the tariff charges, whether they are demanded at the time of delivery or later. *Pittsburgh, etc. Ry. Co. v. Fink*, 250 U. S. 577. P. 70.
- 284 Fed. 250, affirmed.

ERROR to a judgment of the Circuit Court of Appeals, affirming a judgment by the District Court for the defendant Coal Company in an action by the railroad to recover the difference between the amount chargeable under its tariff for an interstate shipment and a less amount collected.

Mr. Homer W. Davis, with whom *Mr. Gardiner Lathrop* and *Mr. Edward S. Jouett* were on the briefs, for plaintiff in error.

Prior to the passage of the Interstate Commerce Act, it was uniformly held that the shipment of goods under a bill of lading containing no express provision requiring payment of freight by the consignor, impliedly bound him so to do, irrespective of whether or not he was the owner of the goods shipped. *Wooster v. Tarr*, 8 Allen, 270; *Blanchard v. Page*, 8 Gray, 281; *Holt v. Westcott*, 43 Me. 445; *Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co.*, 130 Fed. 860; *Hutchinson, Carriers*, 3d ed., § 810; 7 *Amer. & Eng. Enc. L.*, 2d ed., p. 260; *Elliott, Railroads*, § 1659.

The reasons which obtained prior to the Interstate Commerce Act for holding a shipper primarily liable were augmented by its passage. In this case the consignor is liable under the admitted facts. *Pittsburgh, etc. Ry. Co. v. Fink*, 250 U. S. 577; *New York Central, etc. R. R. Co. v. York & Whitney Co.*, 230 Mass. 206; s. c., 256 U. S.

406. Although these decisions relate only to the consignee's liability, their reasoning applies to this case, and they plainly show that instances of occasional hardship must not be allowed to stand in the way of the collection of tariff rates and the enforcement of the provisions of the Interstate Commerce Act, which has for its object the abolition of the numerous abuses which existed before it was enacted.

Only a nominal hardship is imposed on a consignor by holding him liable for an undercharge when the consignee is solvent.

It seems pertinent to observe that if, as claimed by the consignor and found by the courts below, the ultimate consignee was solvent up to the time suit was brought, then any hardship which either consignor or the bill of lading consignee would suffer, should the consignor by the judgment of this Court be now held liable, is the result of the course pursued by the consignor in this case.

It is undisputed that demand was made on the consignor before suit was brought and that the consignor had a contract for the sale of the coke f. o. b. Holt, Alabama, to the firm of Tutwiler & Brooks of Birmingham, Alabama, the bill of lading consignee.

Instead of paying the undercharge and making collection from either Tutwiler & Brooks or the Smelter Corporation, the consignor, so far as the record shows, did nothing before, or for over fifteen months after, the suit was brought, when it filed a demurrer to the complaint.

If, as testified, the Smelter Corporation was solvent up to January, 1920, and for three months thereafter, and during that time could have been forced to pay the amount due on execution, there is no reason why the consignor and Tutwiler & Brooks could not have made collection during that period from the Smelter Corporation, since the purchase of goods f. o. b. a given point with directions to the consignor to ship to some other point, and the payment of

the purchase price, unquestionably binds the purchaser to see that the consignor or the party from whom the goods are purchased is not thereafter held liable for the freight charges.

Neither estoppel nor election can become the means of avoiding payment of tariff rates. *Pittsburgh, etc., Ry. Co. v. Fink*, 250 U. S. 577.

No reason is given by the court below in explanation of its position that, while by conduct a carrier could not raise an estoppel which would release a consignor, yet by the same kind of conduct it could make an election which would have that effect.

It has frequently been held that the doctrine of election of remedies is simply an application of the law of estoppel. *Crockett First National Bank v. Barse Live Stock Commission Co.*, 198 Ill. 232; *Baker v. Edwards*, 176 N. C. 229; *Warriner v. Fant*, 114 Miss. 174; *Bierce, Ltd. v. Hutchins*, 205 U. S. 340.

Certainly, any election must arise out of some act of the party who has the choice of remedies, and not out of an act or change in the financial responsibility of someone else, and in either of those cases the only act of the Railroad Company would be to collect part of the charges upon delivery at destination.

Furthermore, election applies in the case of inconsistent and not alternative remedies. *Friederichsen v. Renard*, 247 U. S. 207. In the case of consignor and consignee, it would not be inconsistent to sue both of them at the same time for freight charges, although recovery from either would bar the suit against the other. The rights of the carrier to hold either or both are alternative or cumulative. *Central R. R. Co. v. MacCartney*, 68 N. J. L. 165. *Yazoo & Mississippi Valley R. Co. v. Zemurray*, 238 Fed. 789, distinguished.

The Interstate Commerce Commission and numerous courts have passed on the question involved in this case

in the light of the Interstate Commerce Act, and almost without exception hold that the consignor must pay if the consignee does not. *Great Northern Ry. Co. v. Hyder*, 279 Fed. 783; *New York Central R. R. Co. v. Federal Sugar Refining Co.*, 235 N. Y. 182; *Cleveland, etc. Ry. Co. v. Southern Coal & Coke Co.*, 147 Tenn. 433; *New York, etc. R. R. Co. v. Tonella*, 79 N. H. 464; *Wells Fargo & Co. v. Cuneo*, 241 Fed. 727; *Boise Commercial Club v. Adams Express Co.*, 17 I. C. C. 115; *Boston & Maine R. R. v. National Orange Co.*, 232 Mass. 351; *Great Northern Ry. Co. v. Hocking Valley Fire Clay Co.*, 166 Wis. 465; *Chicago, etc. Ry. Co. v. Peterson*, 168 Wis. 193; *Baltimore & Ohio S. W. Ry. Co. v. New Albany Box & Basket Co.*, 48 Ind. App. 647; *Atchison, T. & S. F. Ry. Co. v. Stannard & Co.*, 99 Kans. 720; *Jelks v. Philadelphia & Reading Ry. Co.*, 14 Ga. App. 96.

It is true that, in practically all of the above cases, there was no dispute but that the consignee was insolvent, because it is not the practice to collect undercharges from consignors when there is any reasonable prospect of making collection from the consignee.

But all the cases referred to were decided on the ground that there was, and must be, to enforce the Interstate Commerce Act, an absolute liability on the part of the consignor to pay if the consignee does not.

The consignee was not solvent when this suit was brought, except in the sense that one may be said to be solvent until adjudged otherwise.

Mr. Henry A. Jones, with whom *Mr. Allan C. Rearick*, *Mr. A. C. Travis*, *Mr. De Vane K. Jones* and *Mr. Adrian Van de Graaff* were on the briefs, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In January, 1917, the Central Iron & Coal Company sold Tutwiler & Brooks ten carloads of coke to be deliv-

ered f. o. b. cars at the seller's plant in Holt, Alabama. Before delivery by the seller, the purchasers sold the coke to the Great Western Smelters Corporation of Mayer, Arizona. Thereafter, under instructions from Tutwiler & Brooks, and upon their agreement to pay the freight, the Central Company delivered, at its plant, the cars of coke to the Louisville and Nashville Railroad; directed shipment thereof to Mayer over that railroad and connecting lines; and took bills of lading which it delivered immediately to Tutwiler & Brooks. That firm made a draft for the purchase price on the Smelters Corporation, with bills of lading attached. The corporation paid the draft; received the bills of lading; and, upon surrendering them to the delivering carrier and payment to it of the freight demanded, obtained possession of the coke. The amount of the freight then demanded and paid was \$5,082.15. The freight legally payable, according to the tariff, was \$8,545.61.

The undercharge was apparently not discovered until January, 1920. The Louisville and Nashville then made demand upon the Central Company for the amount (\$3,463.46). Payment being refused, this action to recover it was brought in the federal court for the Northern District of Alabama, Western Division. Each party requested a directed verdict. It was directed for the defendant; judgment entered thereon was affirmed by the Circuit Court of Appeals, 284 Fed. 250; and the case is here on writ of error under § 241 of the Judicial Code. Most of the facts were agreed. The bills of lading acknowledged receipt of the coke from the Central Company; stated that the coke was "consigned to Order Of Tutwiler & Brooks, Destination Mayer, Arizona, . . . Notify Great Western Smelters Corporation"; and provided, among other so-called conditions, that "The owner or consignee shall pay the freight, and average, if any, . . . and, if required, shall pay the same before

delivery.”¹ There was no suggestion that Tutwiler & Brooks were insolvent. Whether collection could then have been made from the Smelters Corporation is a matter as to which there was conflicting evidence.²

The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charges legally payable was determined by applying this tariff rate to the actual weight. Thus, they were fixed by law. No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fink*, 250 U. S. 577; *New York Central, etc. R. R. Co. v. York & Whitney Co.*, 256 U. S. 406. Compare *St. Louis Southwestern Ry. Co. v. Spring River Stone Co.*, 236 U. S. 718. But delivery of goods to a carrier for shipment does not, under the Interstate Com-

¹ The bills of lading also contained these clauses: “If charges are to be prepaid, write or stamp here. Received \$. to apply in prepayment of. To be prepaid.” The blanks were not filled by writing or stamp. The form of bills of lading used was what is known as the standard form order bill of lading. But the goods shipped were made deliverable to the order of a named consignee. Compare *Pere Marquette Ry. Co. v. French & Co.*, 254 U. S. 538, 539, 540.

² The corporation was not then technically insolvent. That is, no proceeding in bankruptcy had been instituted by or against it; there was no outstanding unsatisfied execution; and the corporation was still in possession of some unencumbered property. If the error had been discovered within a few months after delivery of the coke, the delivering carrier might easily have obtained payment of the amount of the undercharge by applying to that purpose funds of the Smelters Corporation then on deposit with it.

merce Act, impose upon a shipper an absolute obligation to pay the freight charges.³ The tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination.⁴ The carrier was at liberty to require prepayment of freight charges; or to permit that payment to be deferred until the goods reached the end of the transportation. *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651, 656. Where payment is so deferred, the carrier may require that it be made before delivery of the goods; or concurrently with the delivery; or may permit it to be made later. Where the payment is deferred, the contract may provide that the shipper agrees absolutely to pay the charges; or it may provide merely that he shall pay if the

³ See Interstate Commerce Commission Conference Ruling No. 314, Bulletin No. 7, issued August 1, 1917: "The law requires the carrier to collect and the party legally responsible to pay the lawfully established rates without deviation therefrom. It follows that it is the duty of carriers to exhaust their legal remedies in order to collect undercharges from the party or parties legally responsible therefor. It is not for the Commission, however, to determine in any case which party, consignor or consignee, is legally liable for the undercharge, that being a question determinable only by a court having jurisdiction and upon the facts of each case." This ruling, which was adopted May 1, 1911, and "interpreted" May 4, 1918, was amended, on March 6, 1922, by calling attention to the provision inserted in the Uniform Domestic Bill of Lading prescribed October 21, 1921. By that provision the consignor may (see Section 7 of Conditions and clause on face of bill) relieve himself of all liability for freight charges. *In the Matter of Bills of Lading*, 52 I. C. C. 671, 721; 64 I. C. C. 347; *ibid*, 357; 66 I. C. C. 63.

⁴ But see § 3 of the Interstate Commerce Act, as amended February 28, 1920, c. 91, § 405, 41 Stat. 456, 479. *In re Section 3, etc.*, (*Regulations for Payment of Rates and Charges*) 57 I. C. C. 591.

Compare *Hocking Valley Ry. Co. v. United States*, 210 Fed. 735, 741; *Boise Commercial Club v. Adams Express Co.*, 17 I. C. C. 115, 121.

consignee does not pay the charges demanded upon delivery of the goods. Or the carrier may accept the goods for shipment solely on account of the consignee; and, knowing that the shipper is acting merely as agent for the consignee, may contract that only the latter shall be liable for the freight charges. Or both the shipper and the consignee may be made liable. Nor does delivery of goods to a carrier necessarily import, under the general law, an absolute promise by the shipper to pay the freight charges. We must, therefore, determine what promise, if any, to pay freight charges was, in fact, made by the Central Company.

To ascertain what contract was entered into we look primarily to the bills of lading, bearing in mind that the instrument serves both as a receipt and as a contract.⁵ Ordinarily, the person from whom the goods are received for shipment assumes the obligation to pay the freight charges; and his obligation is ordinarily a primary one. This is true even where the bill of lading contains, as here, a provision imposing liability upon the consignee. For the shipper is presumably the consignor; the transportation ordered by him is presumably on his own behalf; and a promise by him to pay therefor is inferred (that is, implied in fact), as a promise to pay for goods is implied, when one orders them from a dealer. But this inference may be rebutted, as in the case of other contracts. It may be shown, by the bill of lading or otherwise, that the shipper of the goods was not acting on his own behalf; that this fact was known by the carrier; that the parties intended not only that the consignee should assume an obligation to pay the freight charges, but that the shipper should not assume any liability whatsoever

⁵ *Pollard v. Vinton*, 105 U. S. 7, 8; *St. Louis, Iron Mountain & Southern Ry. Co. v. Knight*, 122 U. S. 79, 87; *In the Matter of Bills of Lading*, 52 I. C. C. 671, 681. Compare *Mobile & Montgomery Ry. Co. v. Jurey*, 111 U. S. 584.

therefor;⁶ or that he should assume only a secondary liability. In this case, the bills of lading acknowledge receipt of the coke from the Central Company. But it did not sign them. Nor was it described therein as the consignor. There was no clause by which the shipper agrees expressly either to pay the freight charges or to guarantee their payment. The goods received were not declared to be deliverable to the Central Company's order. On the contrary, the form of the bills of lading indicated that it was neither the owner nor the person on whose behalf the shipment was being made; and that Tutwiler & Brooks were either the owners or the persons in whose behalf the shipment was being made. On these facts, the trial court was justified in finding that the Central Company did not assume the primary obligation to pay the freight charges.⁷

⁶ *Union Freight R. R. Co. v. Winkley*, 159 Mass. 133; *Thomas v. Snyder*, 39 Pa. St. 317, 322; *Wayland's Adm'r. v. Mosely*, 5 Ala. 430; *Chicago, Rock Island & Gulf Ry. Co. v. Floyd*, 161 S. W. (Tex. Civ. App.) 954. See *Barker v. Havens*, 17 Johns. 234, 237; *Grant v. Wood*, 21 N. J. L. 292, 300. Compare *Cincinnati, N. O. & T. P. Ry. Co. v. Vredenburg Saw Mill Co.*, 13 Ala. App. 442.

⁷ In most of the cases in the state courts and the lower federal courts, relied upon by the carrier, either the facts on which the shipper was held liable differed materially from those of the case at bar; or because of the manner in which it was presented, the question of law was different.

In *Chicago, Indianapolis & Louisville Ry. Co. v. Peterson*, 168 Wis. 193, the bill of lading contained an express agreement that the charges were guaranteed by the shipper. See also *Chicago & Northwestern Ry. Co. v. Queenan*, 102 Neb. 391, 393, 398. In *New York Central R. R. Co. v. Federal Sugar Refining Co.*, 235 N. Y. 182; *New York Central R. R. Co. v. Philadelphia & Reading Coal & Iron Co.*, 286 Ill. 267; and *Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co.*, 130 Fed. 860, the goods were deliverable to the shipper's order. In *New York, New Haven, & Hartford R. R. Co. v. Tonella*, 79 N. H. 464, the goods were deliverable to a named consignee, but the shipper was described as consignor and owner. In *Coal & Coke Ry. Co. v. Buckhannon River Coal & Coke Co.*, 77

It is urged that, if the Central Company was not under a primary obligation to pay the freight charges, it was secondarily liable, because collection from the Smelters Corporation of the balance remaining due had become impossible before the undercharge was discovered. But the trial judge was not compelled so to find. There was evidence that such collection had not become impossible. Confessedly no effort was made to collect from it. Nor was any effort made to collect from Tutwiler & Brooks. Moreover, if a secondary obligation of the Central Company was to be implied from the fact of its causing the

W. Va. 309; *Northern Pacific Ry. Co. v. Pleasant River Granite Co.*, 116 Me. 496, 498; *Montpelier & Wells River R. R. v. Bianchi & Sons*, 95 Vt. 81, the goods were deliverable to a named consignee, but the bill of lading was signed by the shipper in his own name. In *Boston & Maine R. R. v. National Orange Co.*, 232 Mass. 351, the goods were deliverable to a named consignee, but he was the agent of the shipper, who was also the owner. *Atlas S. S. Co. v. Colombian Land Co.*, 102 Fed. 358. In *Wooster v. Tarr*, 8 Allen, 270, and *Great Northern Ry. Co. v. Hocking Valley Fire Clay Co.*, 166 Wis. 465, the consignee was named, but there was not in the bill of lading (or otherwise) any indication to the carrier that the shipper was not acting on his own behalf. In *Jelks v. Philadelphia & Reading Ry. Co.*, 14 Ga. App. 96, the consignee was named but refused to accept the shipment. In *New York Central R. R. Co. v. Warren Ross Lumber Co.*, 234 N. Y. 261; *Chicago, Milwaukee & St. Paul Ry. Co. v. Greenberg*, 139 Minn. 428, and *Waters v. Pfister & Vogel Leather Co.*, 176 Wis. 16, it was the consignee who was held liable. In *Georgia R. R. v. Creety*, 5 Ga. App. 424, the shipper appears to have been also owner and consignee. In *Cleveland, C. C. & St. L. Ry. Co. v. Southern Coal & Coke Co.*, 147 Tenn. 433, 442, 452; *Atchison, Topeka & Santa Fe Ry. Co. v. Stannard & Co.*, 99 Kan. 720, 725; *Yazoo & M. V. R. Co. v. Picher Lead Co.*, 190 S. W. (Springfield, Mo., Ct. App.) 387; *Baltimore & Ohio Southwestern Ry. Co. v. New Albany Box and Basket Co.*, 48 Ind. App. 647; and *Wells Fargo & Co. v. Cuneo*, 241 Fed. 727, 729, it is erroneously assumed that the mere fact of delivery of goods for shipment imports, under the Interstate Commerce Act, as matter of law, an absolute promise to pay the freight charges, and/or that an agreement to the contrary is void.

coke to be received for transportation, the promise was not necessarily one to pay at any time any freight charges which the carrier might find it impossible to collect from the consignee or his assign. The court might have concluded that it guaranteed merely that the consignee or his assign would accept the shipment. For, under the rule of the *Fink Case*, if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later. His liability satisfies the requirements of the Interstate Commerce Act.

Affirmed.